BULKY DOCUMENTS

(exceeds 300 pages)

Proceeding/Serial No: 91161373

Filed: 03-20-2006

Title: Opposer's Request to Substitute Exhibits to it's Brief in Opposition to Applicant's Notion for Partial Summary Judgment, and, in the alternative, Motion to Reopen.

Part 2 **of** 3

Strategic Matrix – Ronco

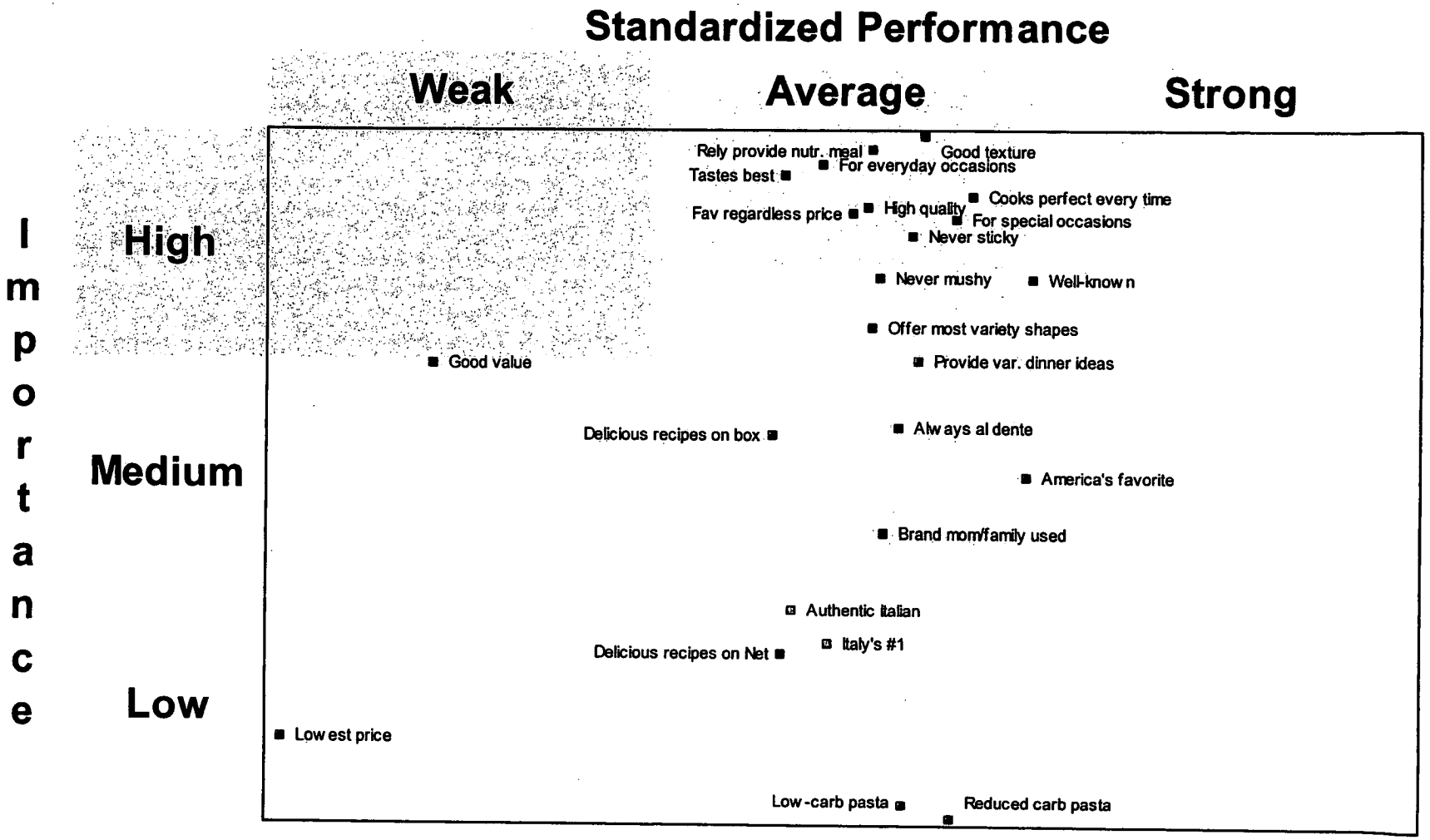
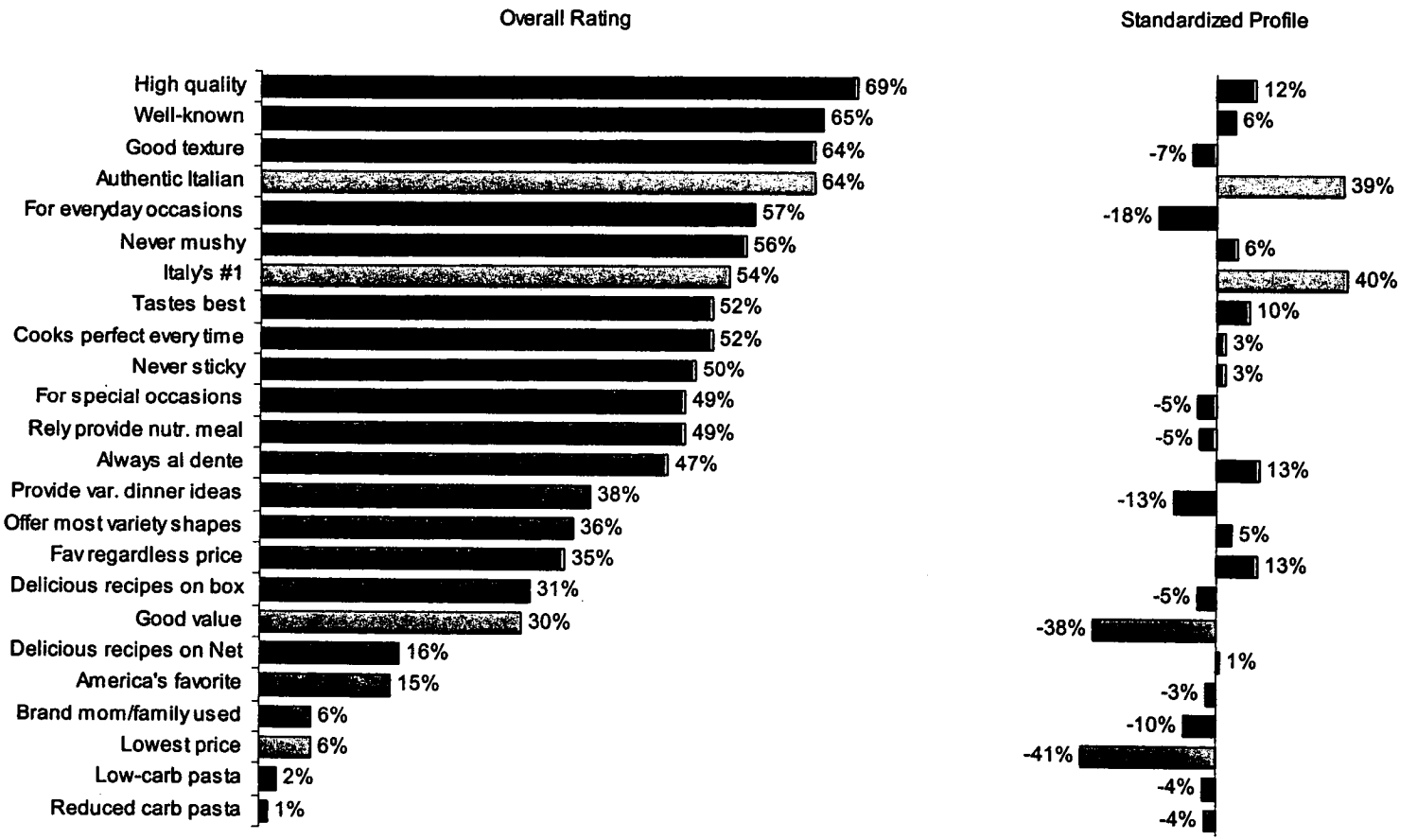


Image Profile – Barilla



Strategic Matrix – Barilla

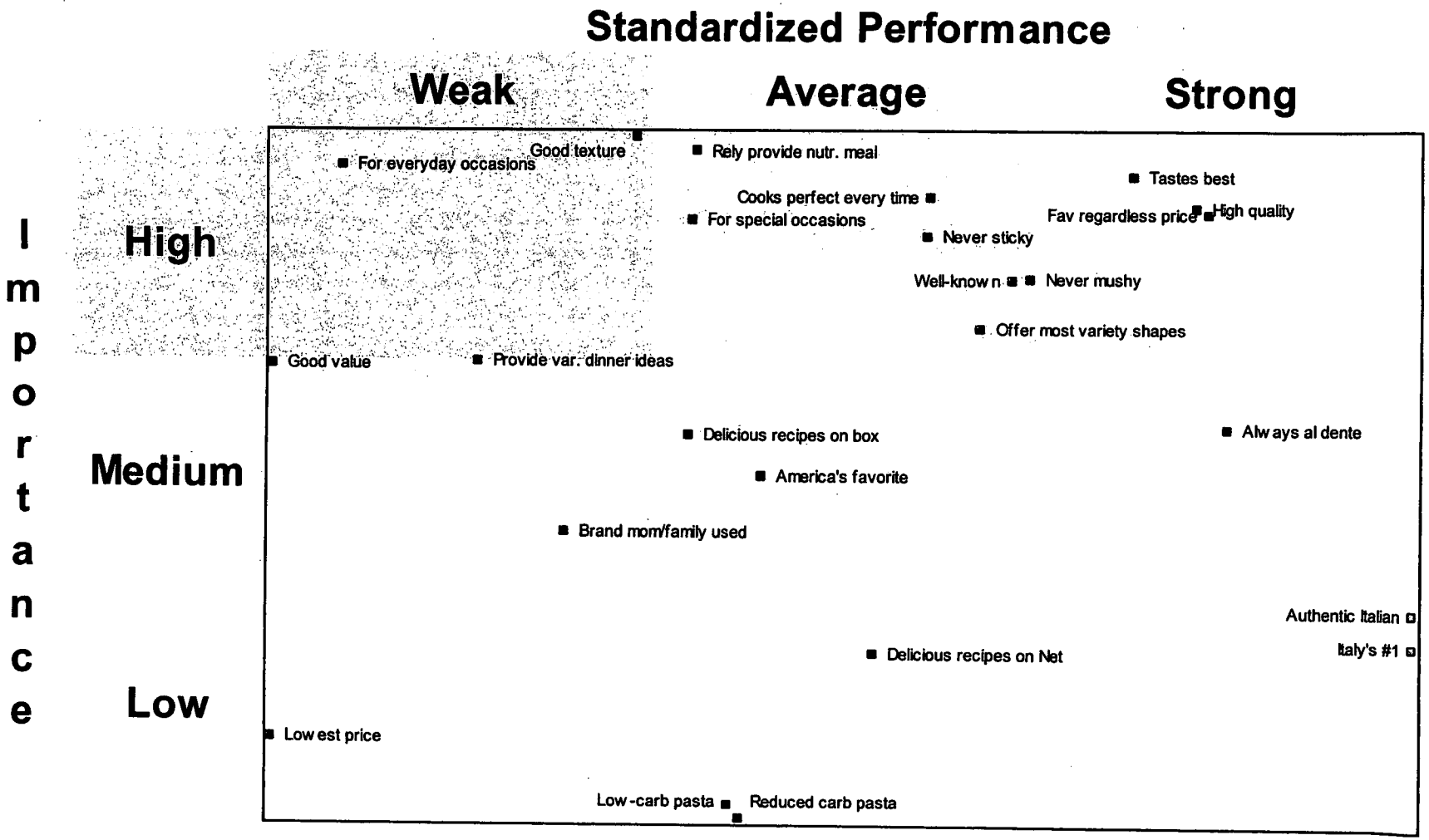
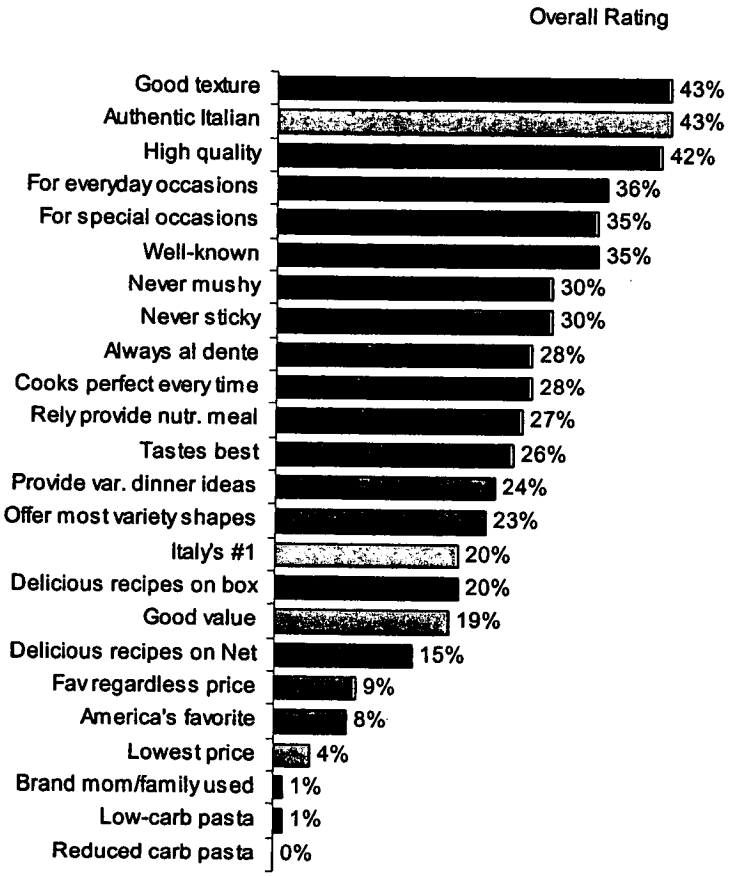
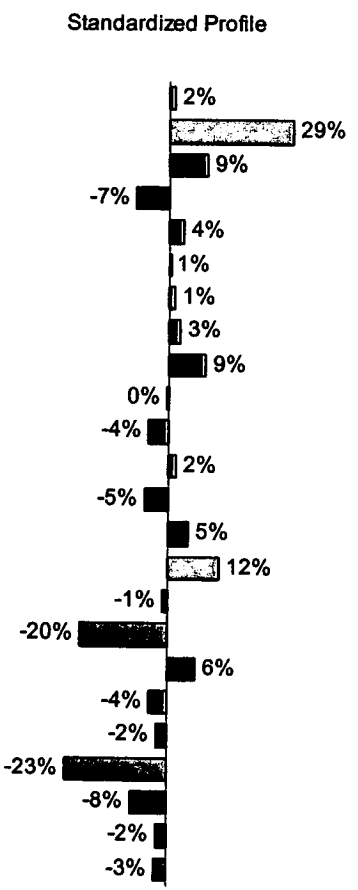


Image Profile – Da Vinci





Strategic Matrix – Da Vinci

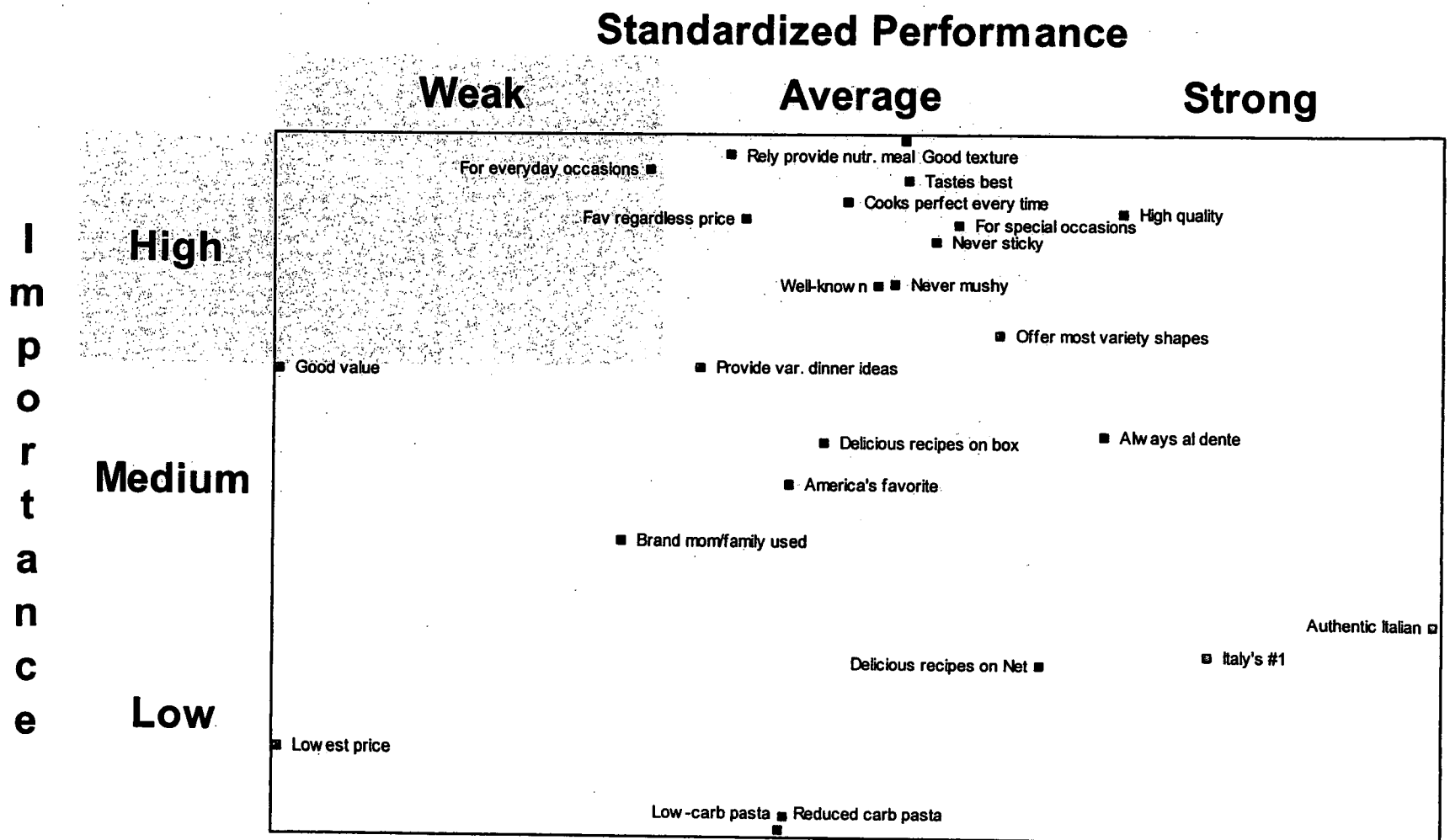
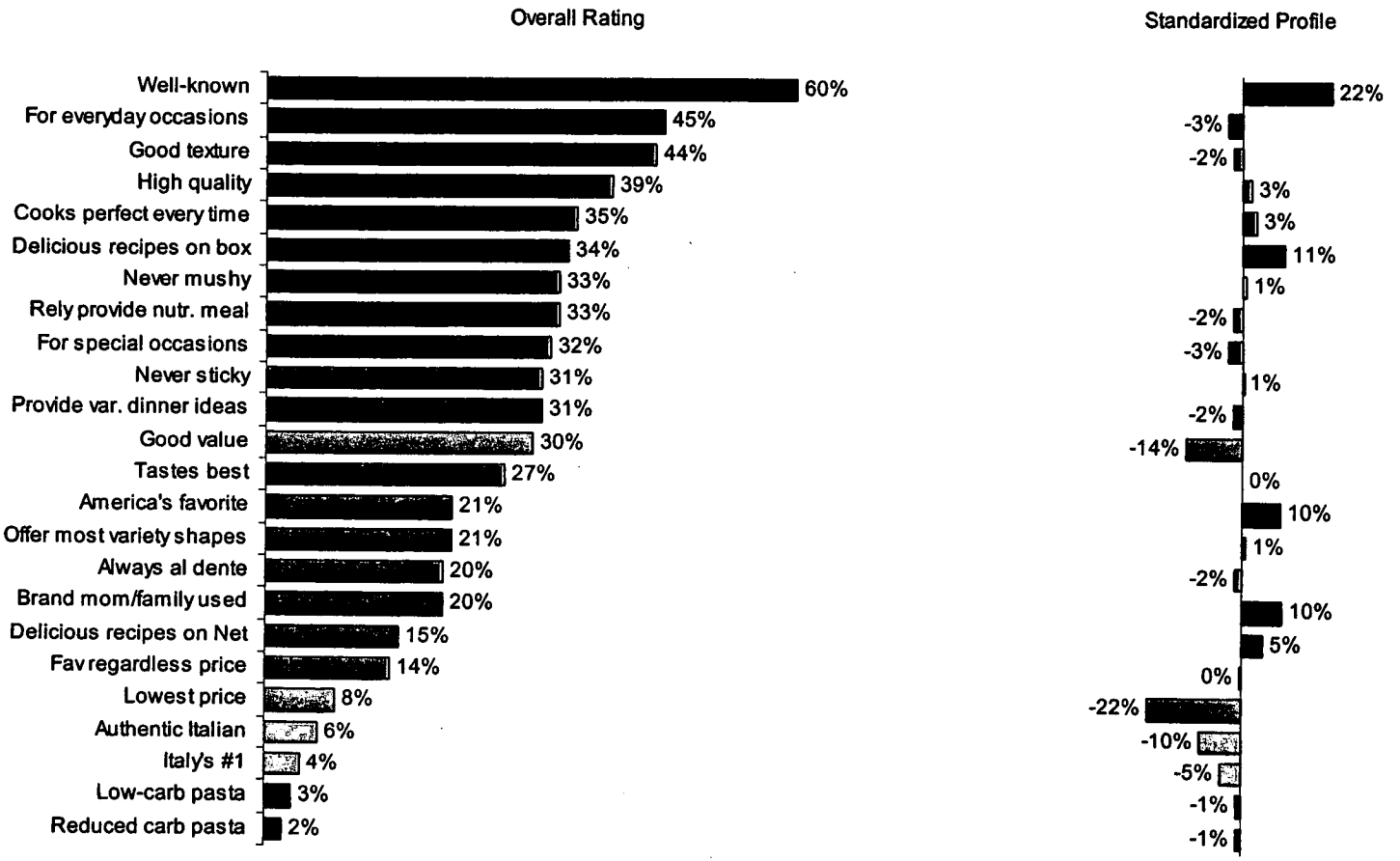


Image Profile – Creamette



Strategic Matrix – Creamette

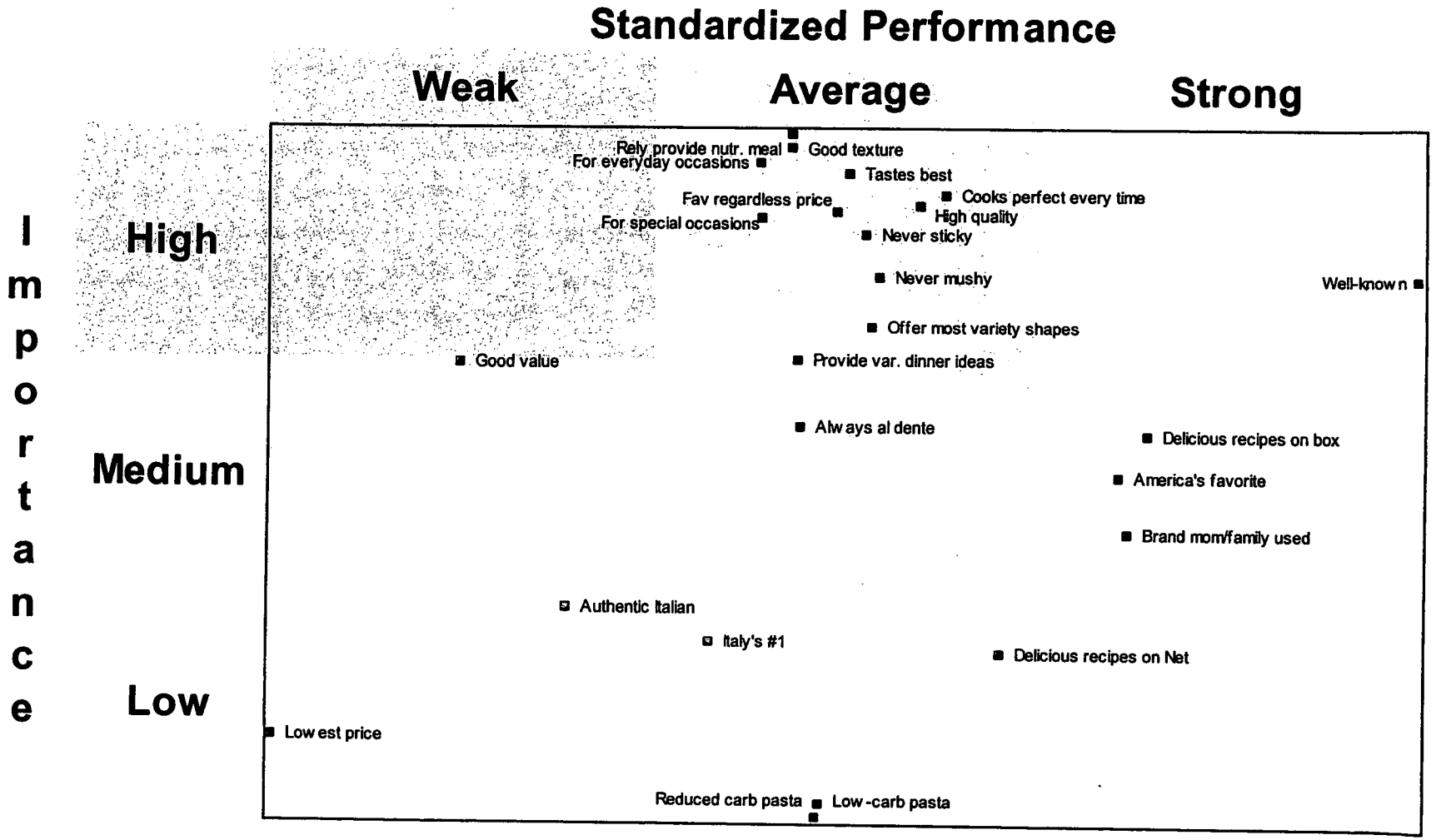
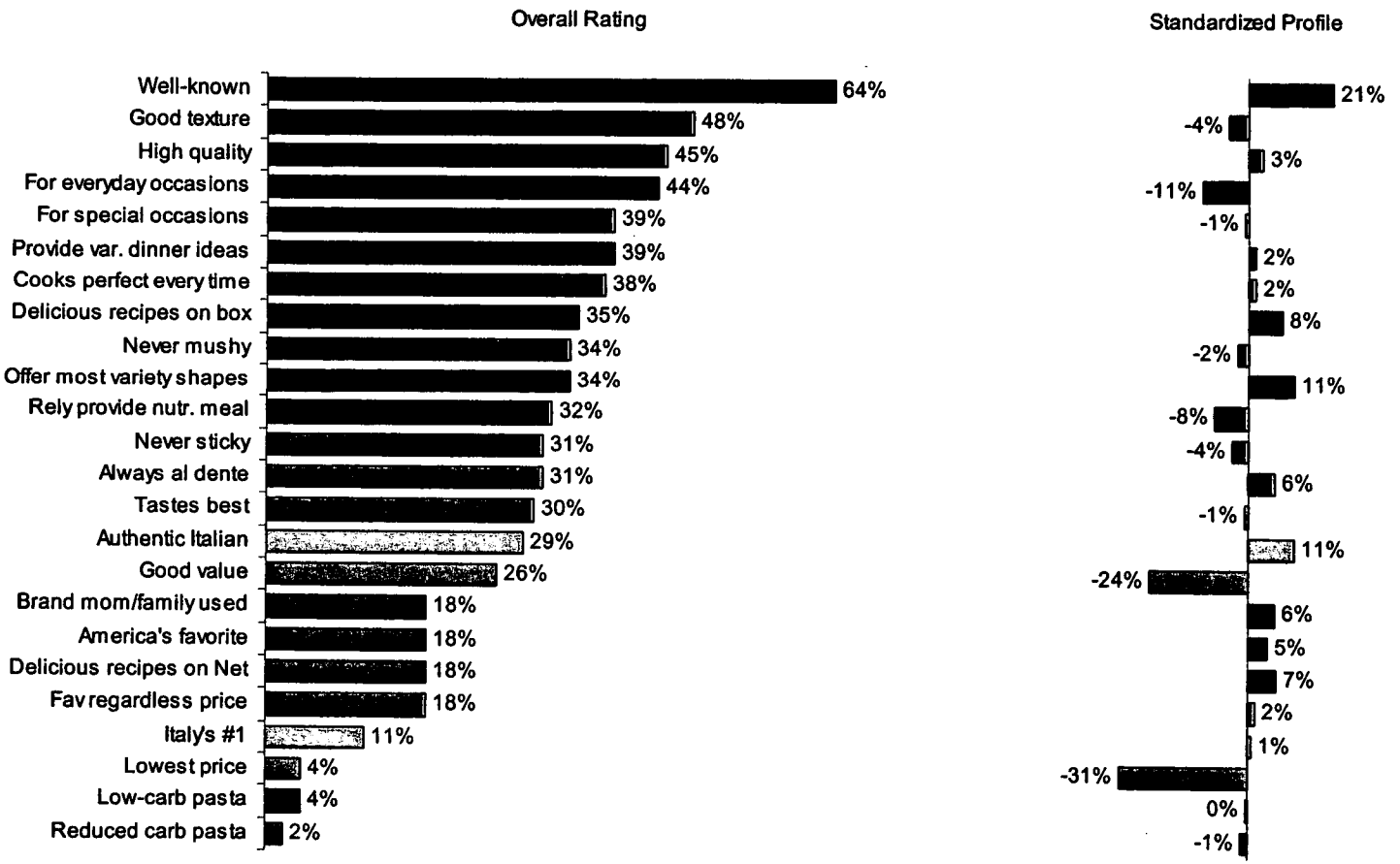


Image Profile – Ronzoni



Strategic Matrix – Ronzoni

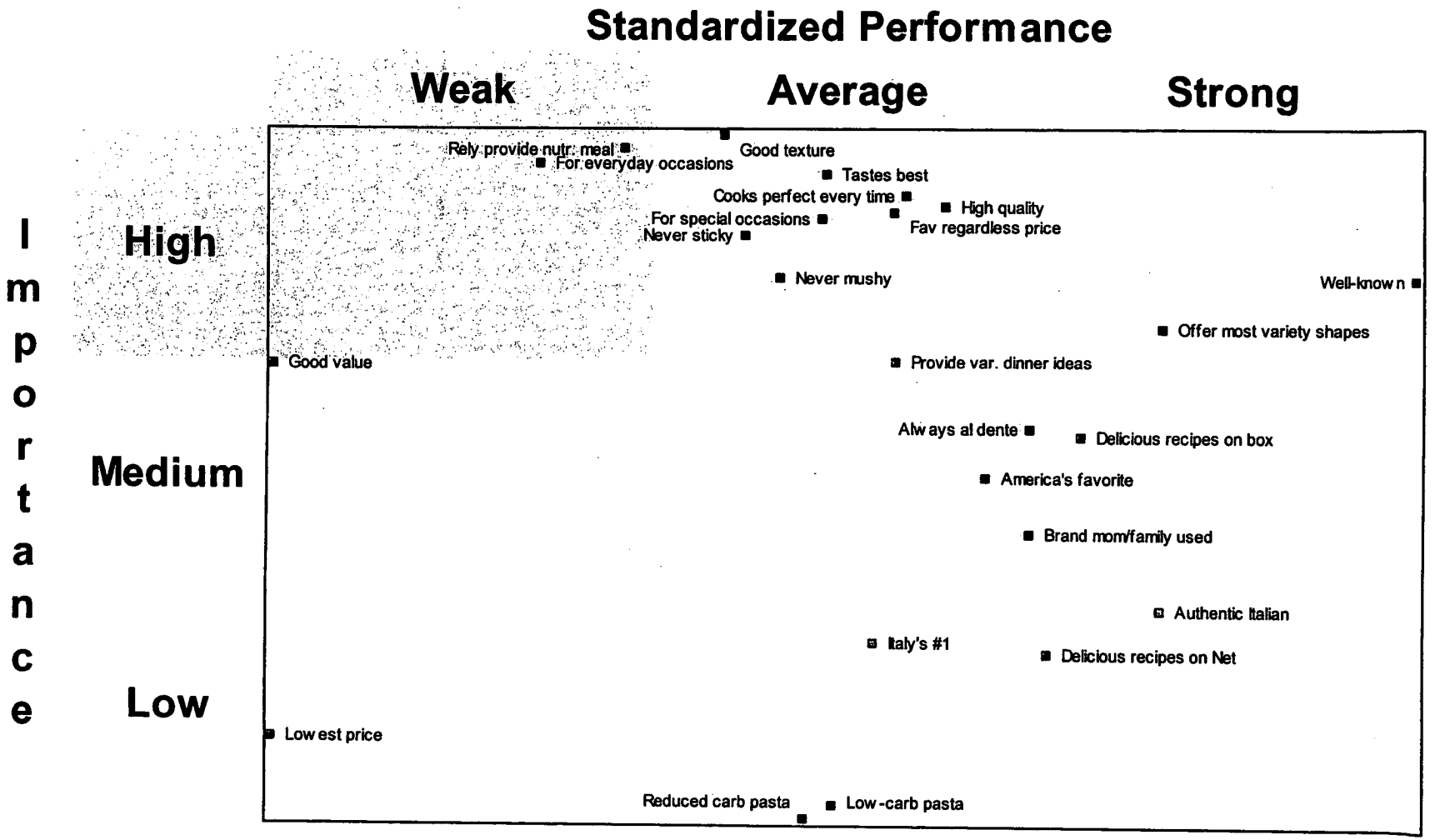
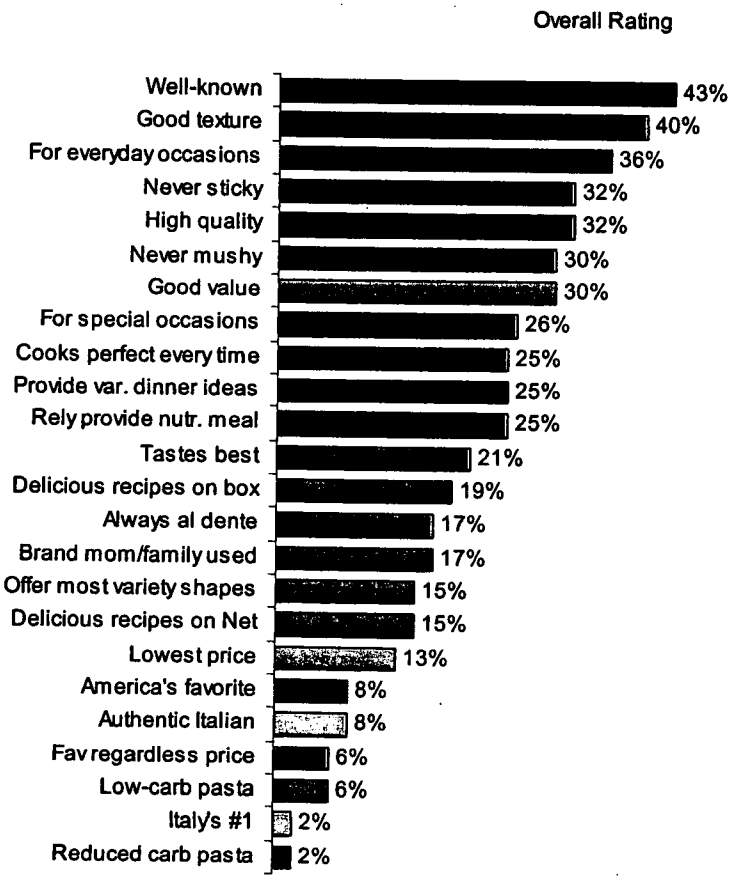
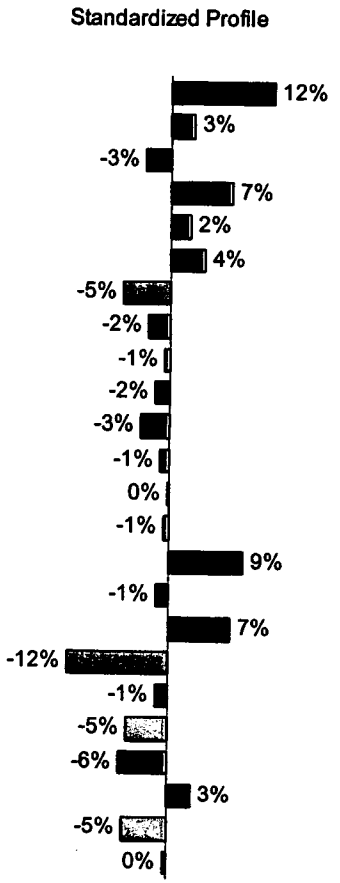


Image Profile – Skinner





Strategic Matrix – Skinner

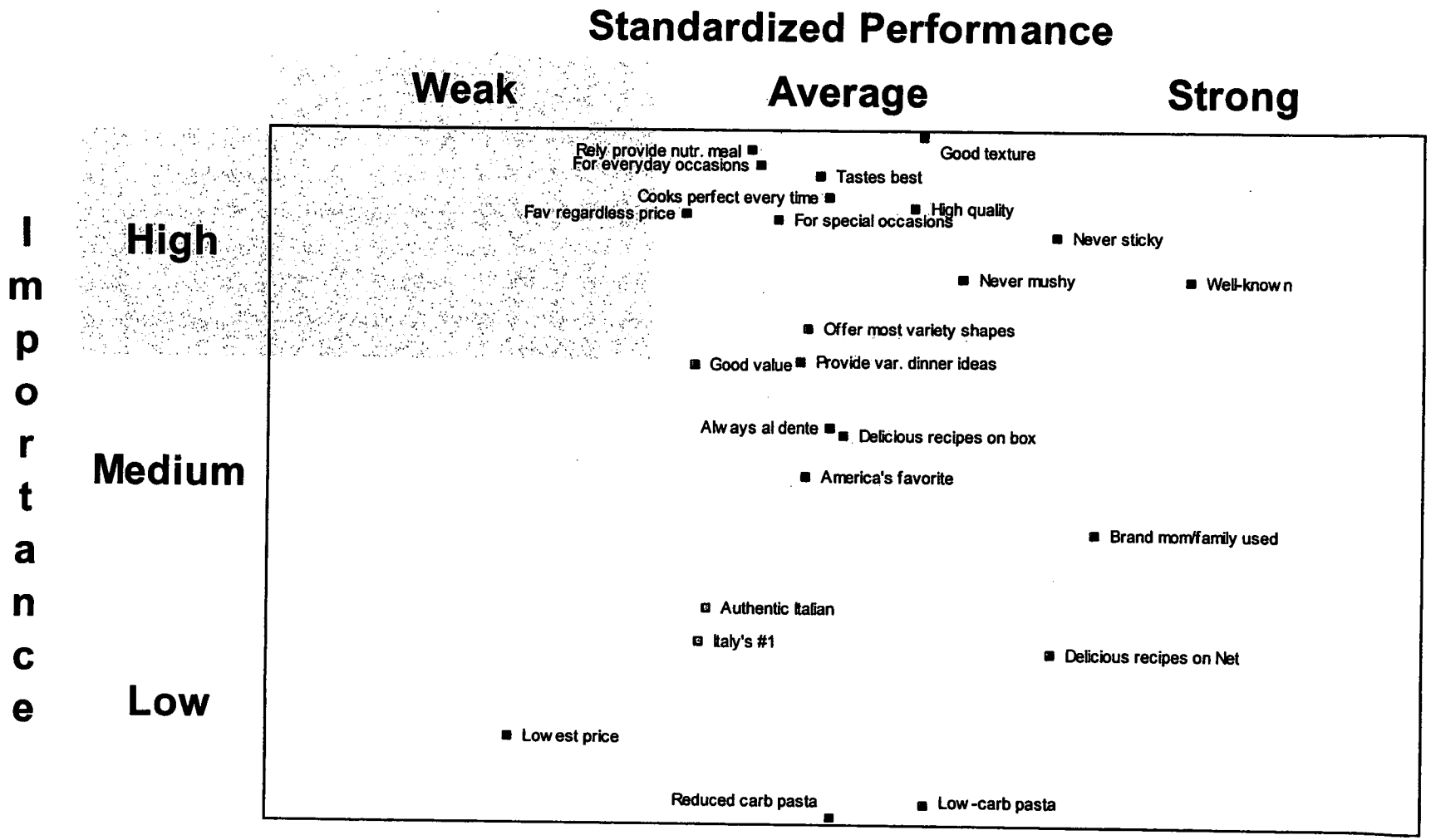
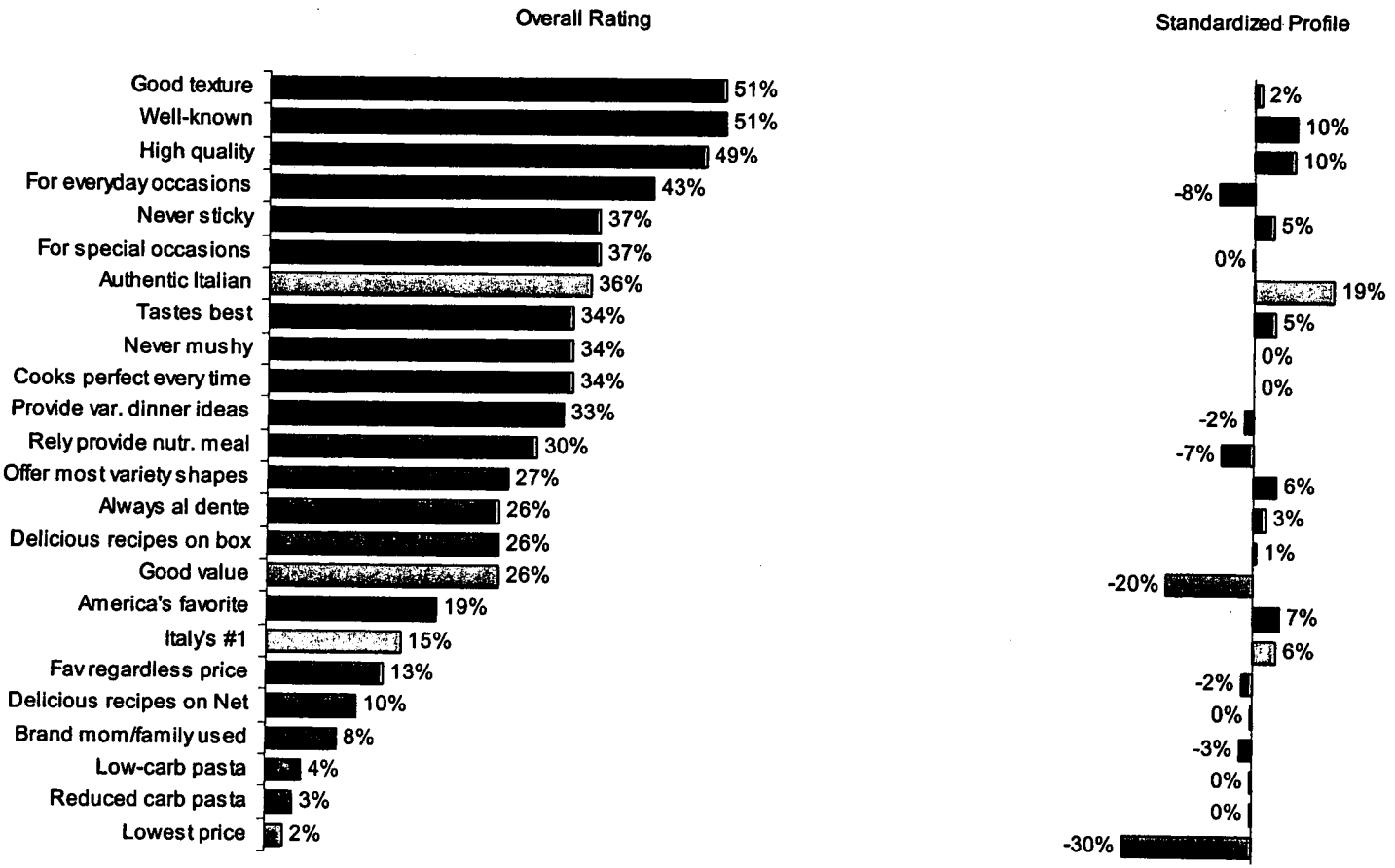


Image Profile – San Giorgio



Strategic Matrix – San Giorgio

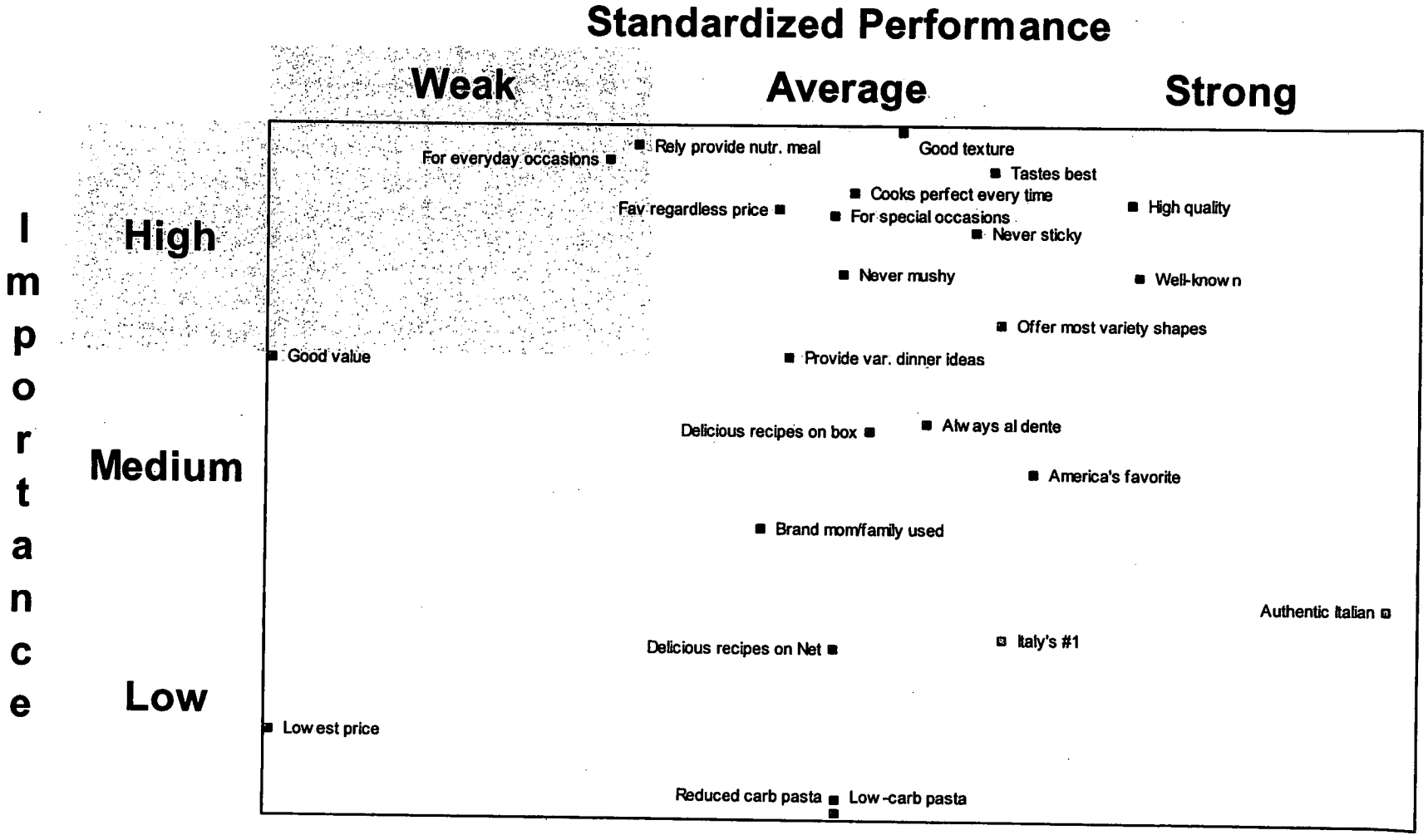
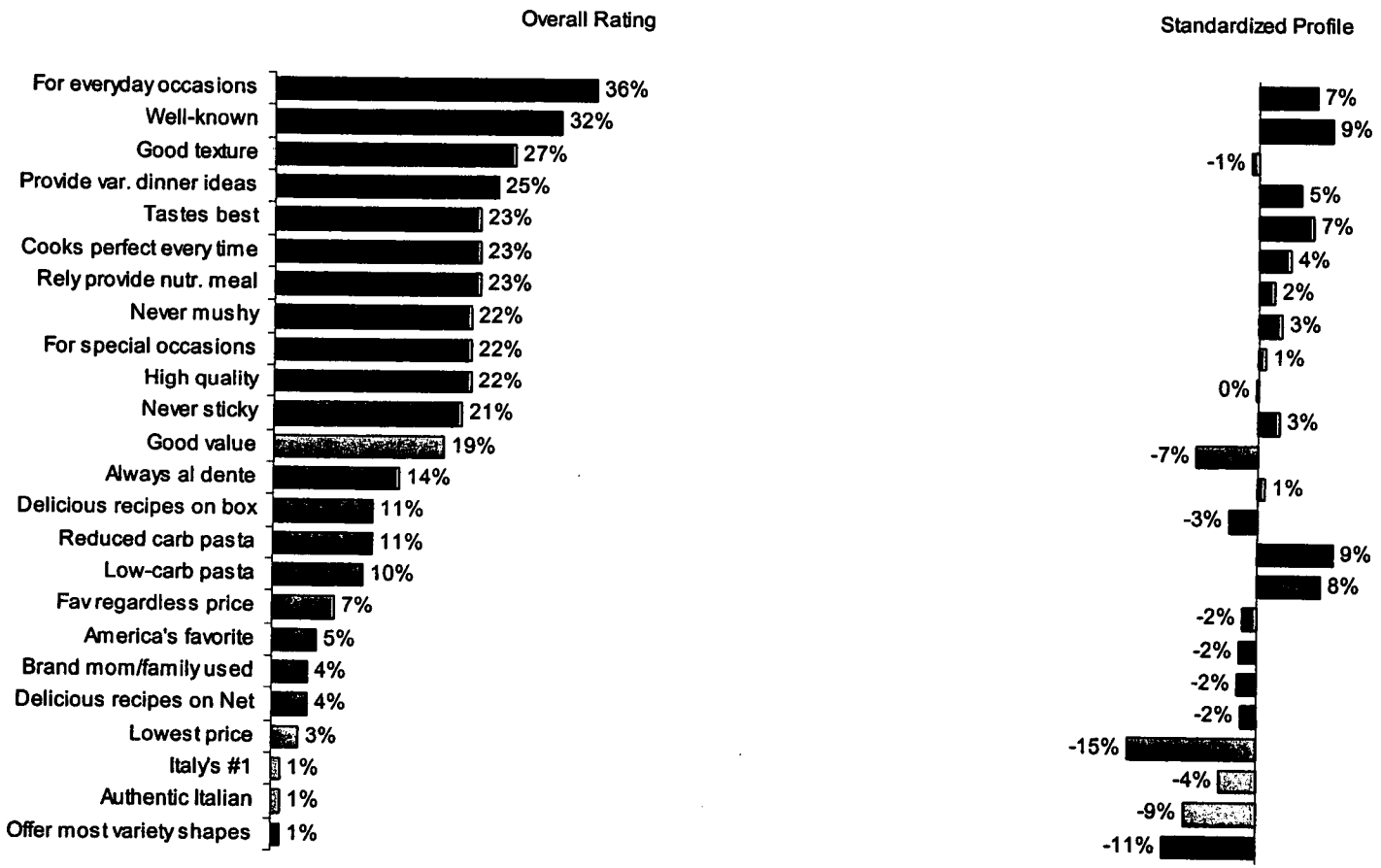


Image Profile – Light 'N Fluffy



Strategic Matrix – Light 'N Fluffy

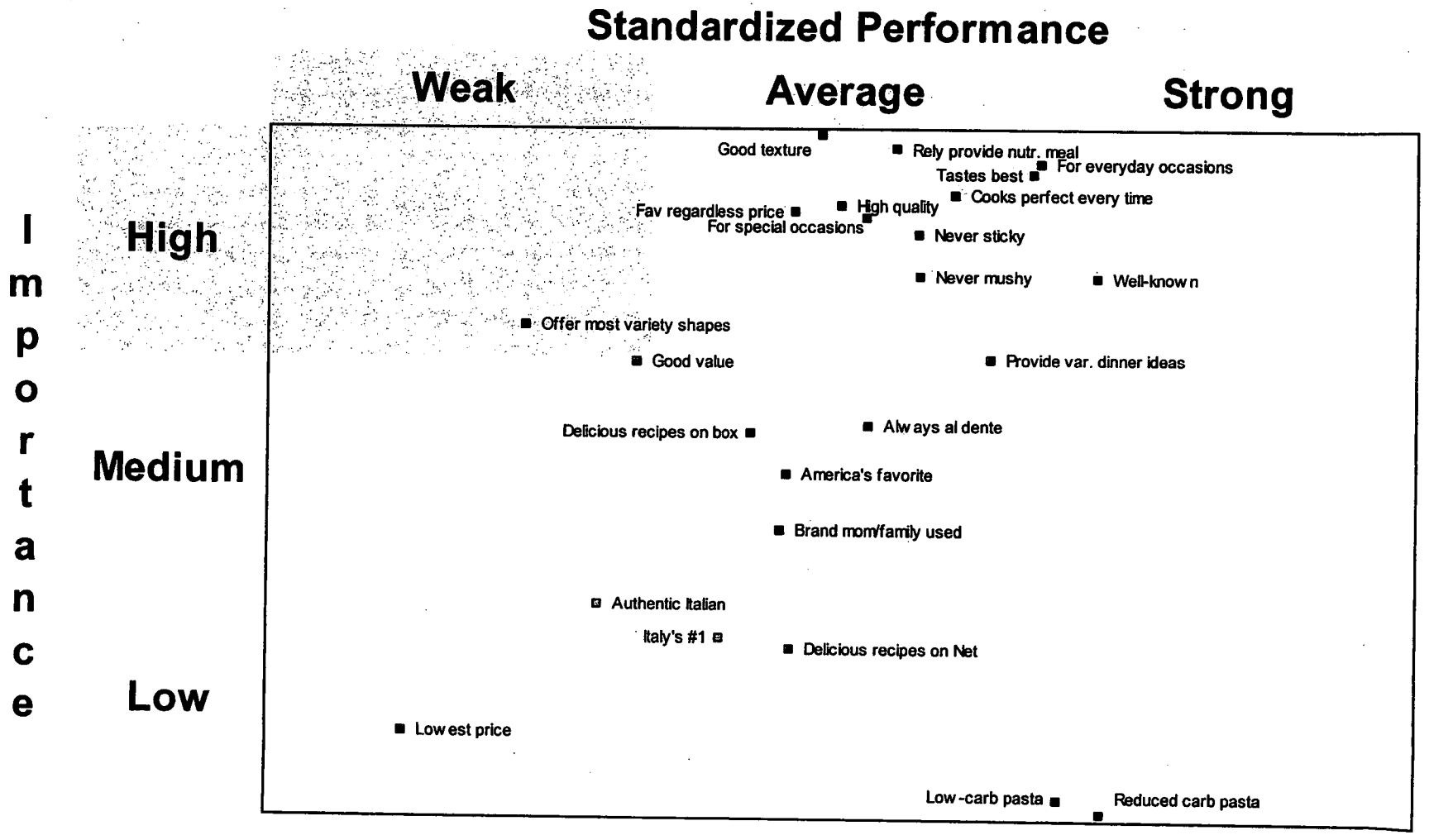
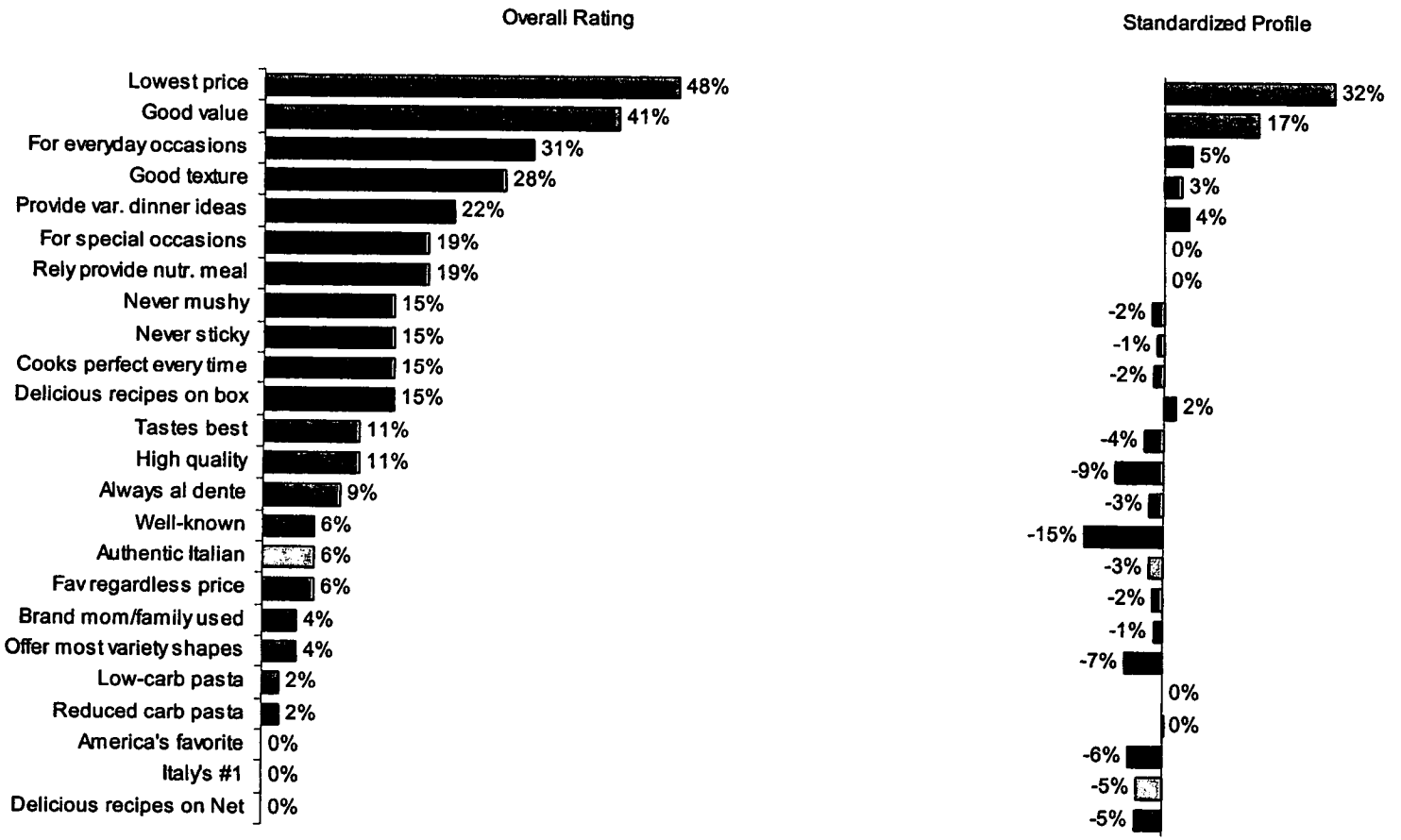


Image Profile – Prestigio



Strategic Matrix – Prestigio

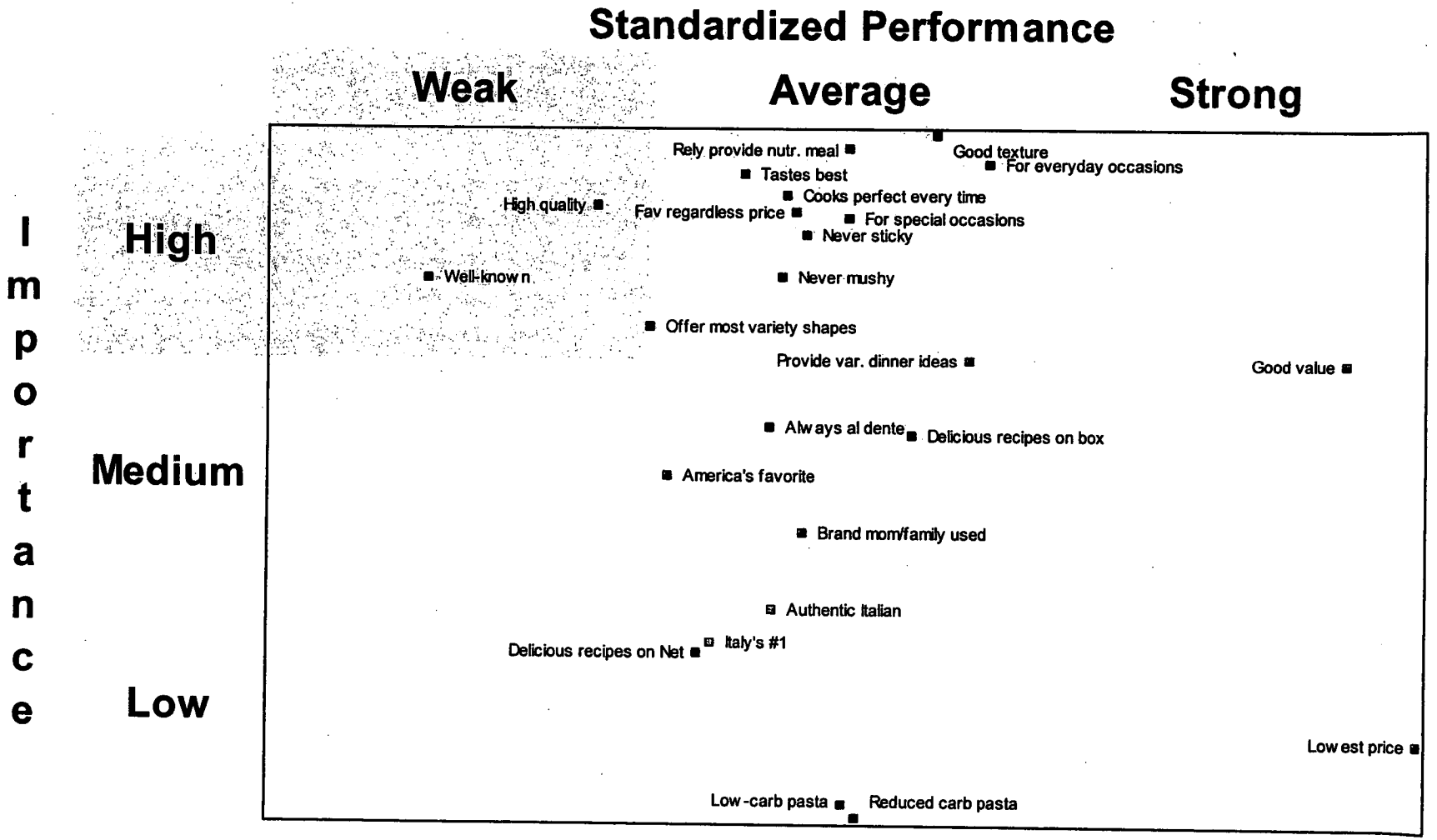
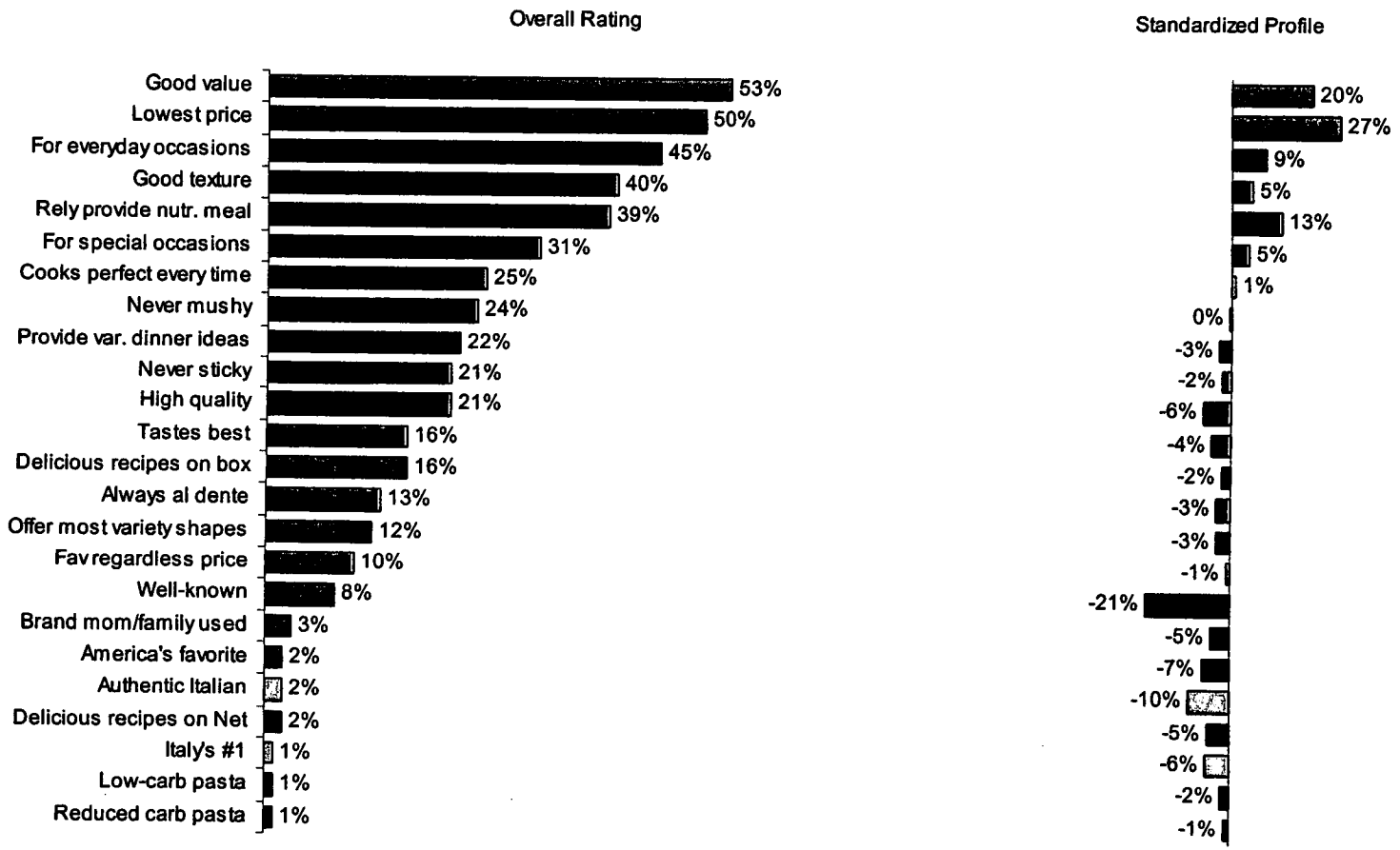


Image Profile – Publix



Strategic Matrix – Publix

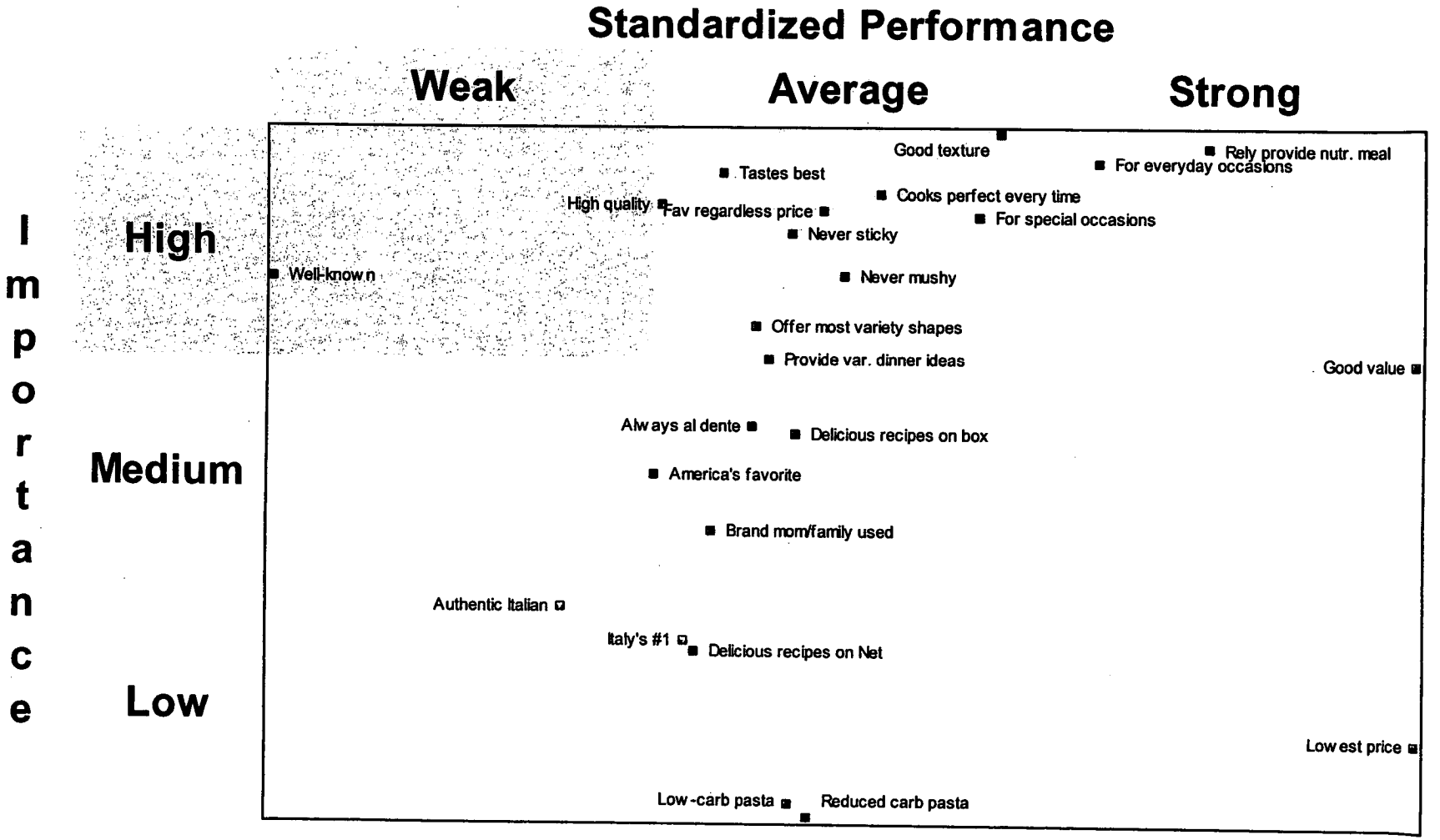
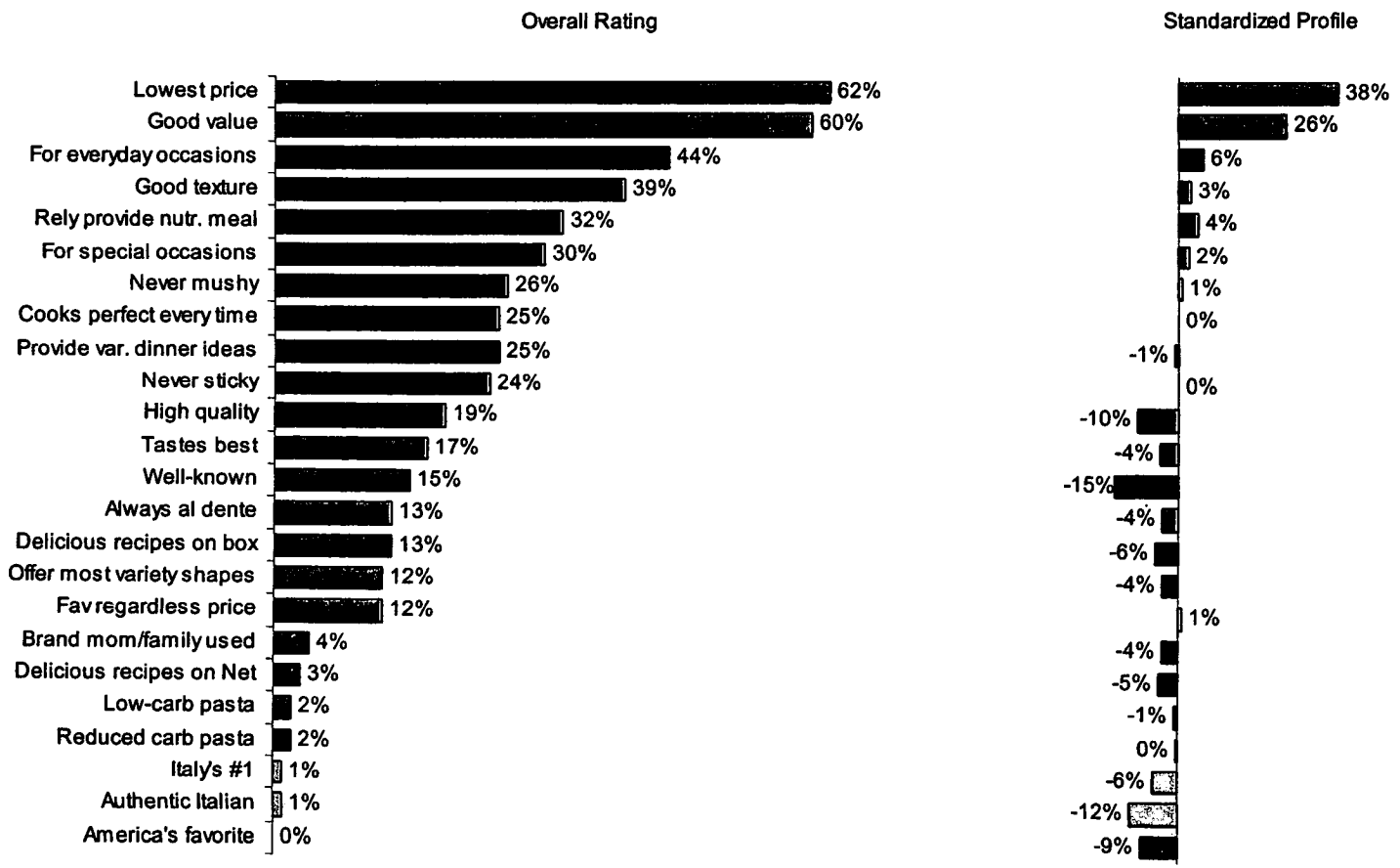


Image Profile – Kroger



Strategic Matrix – Kroger

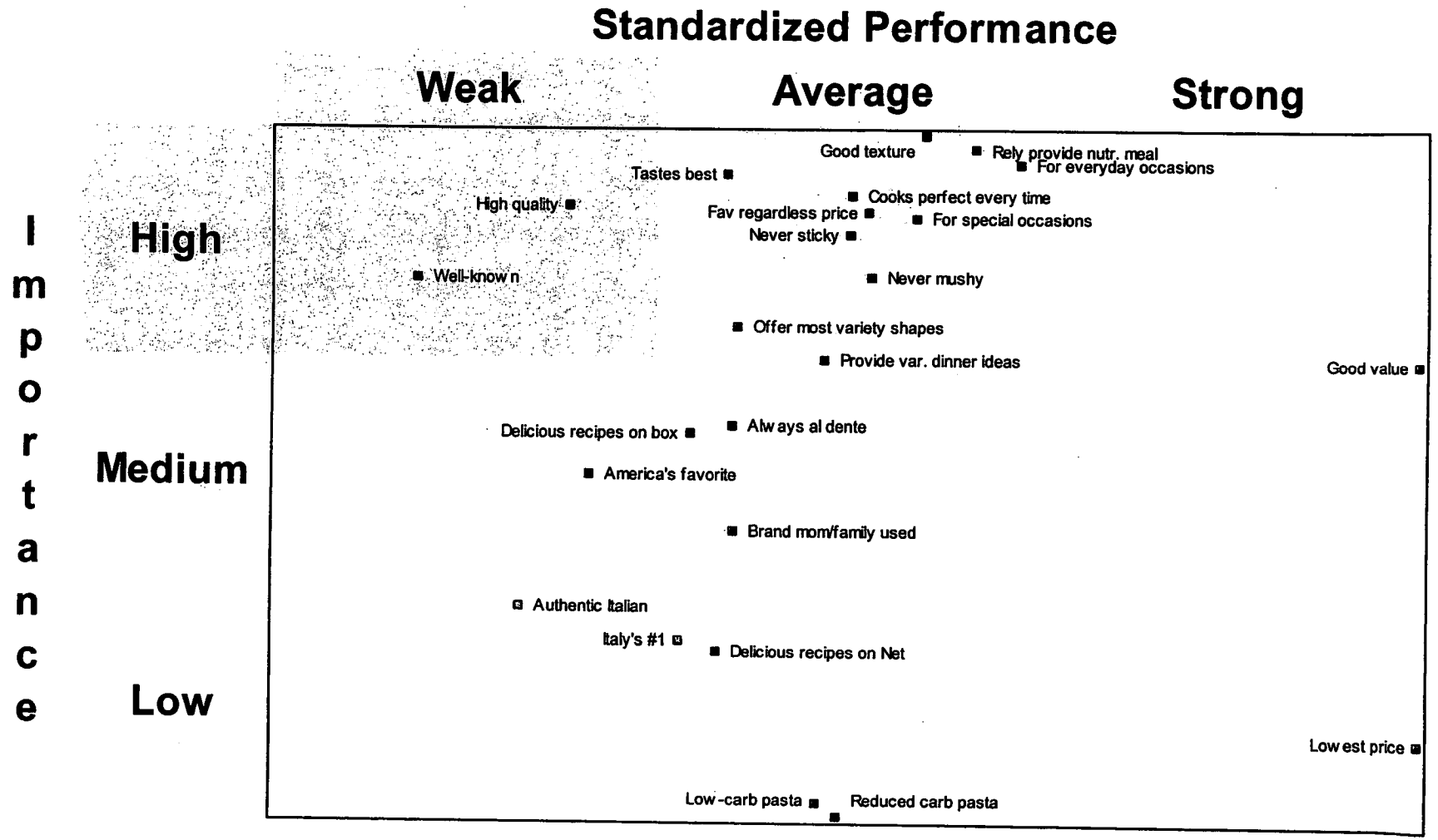
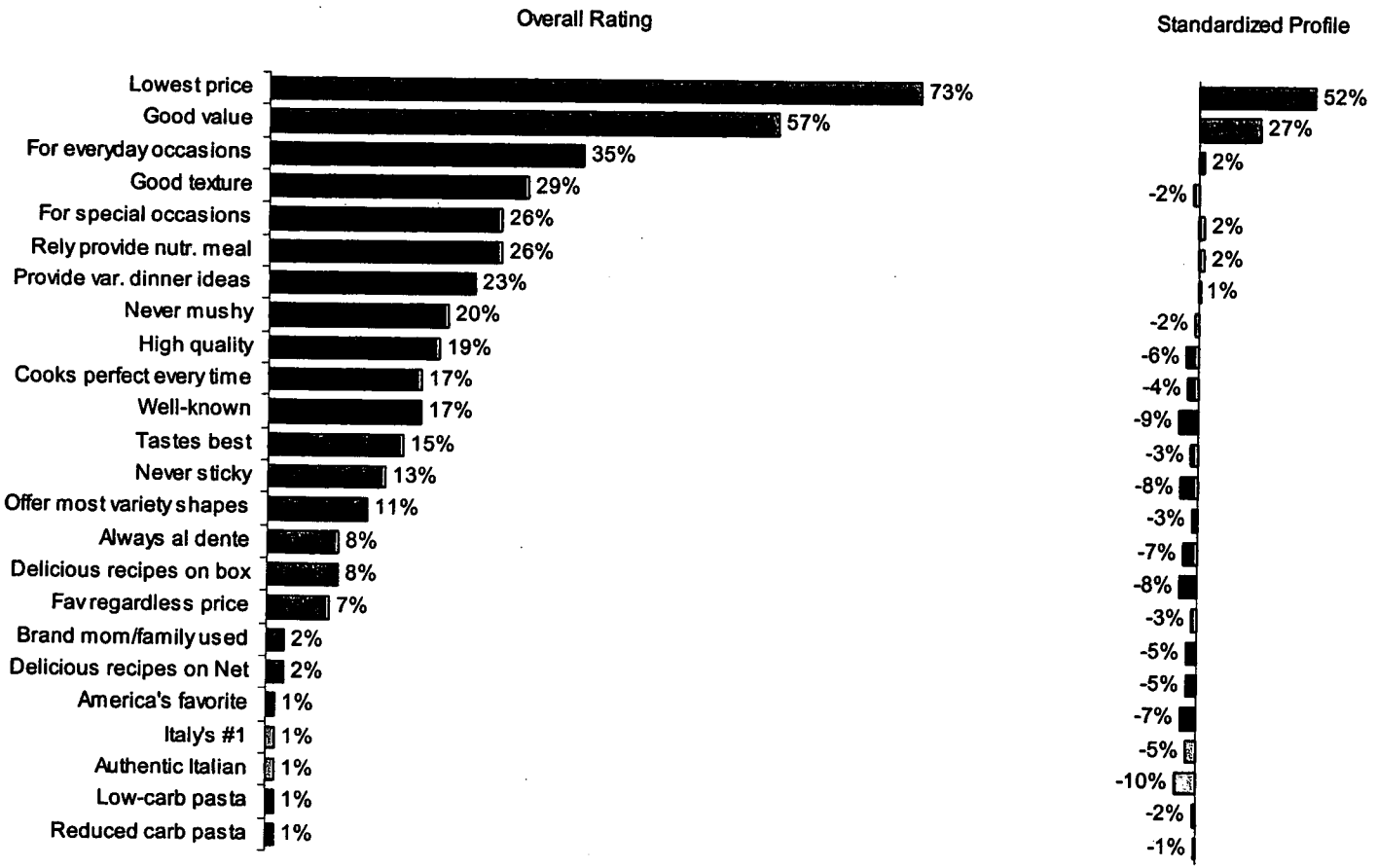


Image Profile – Great Value



Strategic Matrix – Great Value

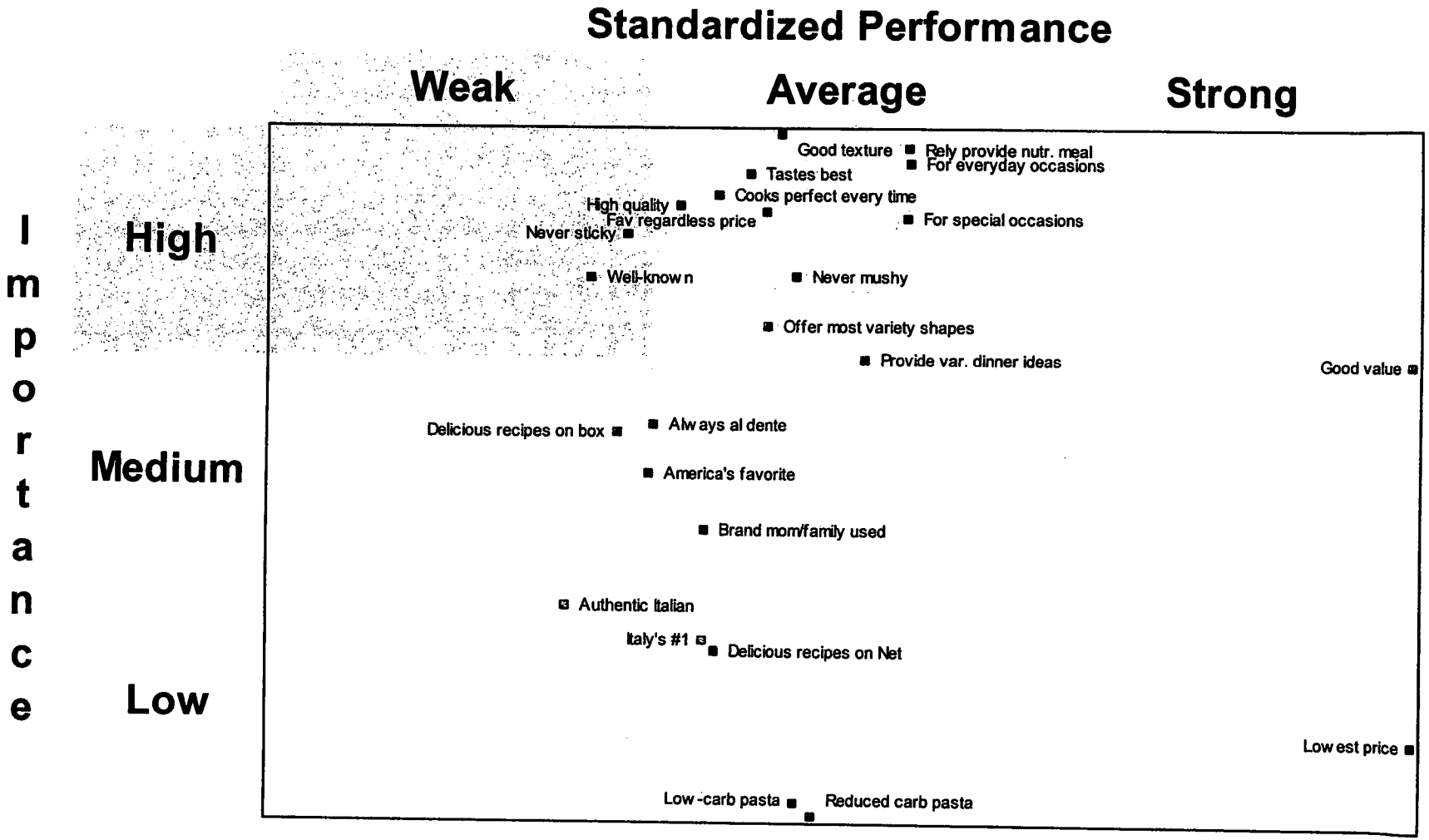
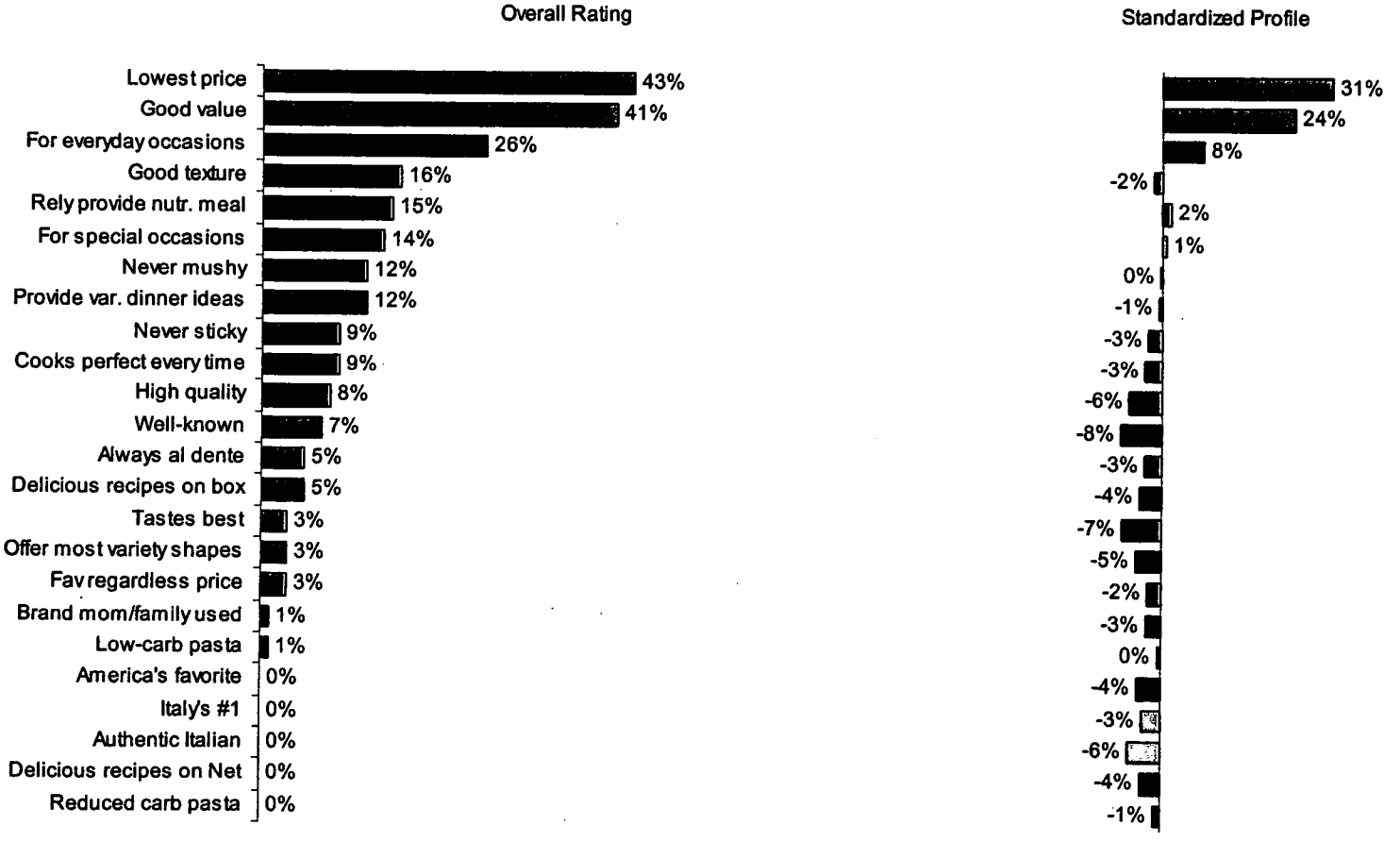


Image Profile – Food Lion



Strategic Matrix – Food Lion

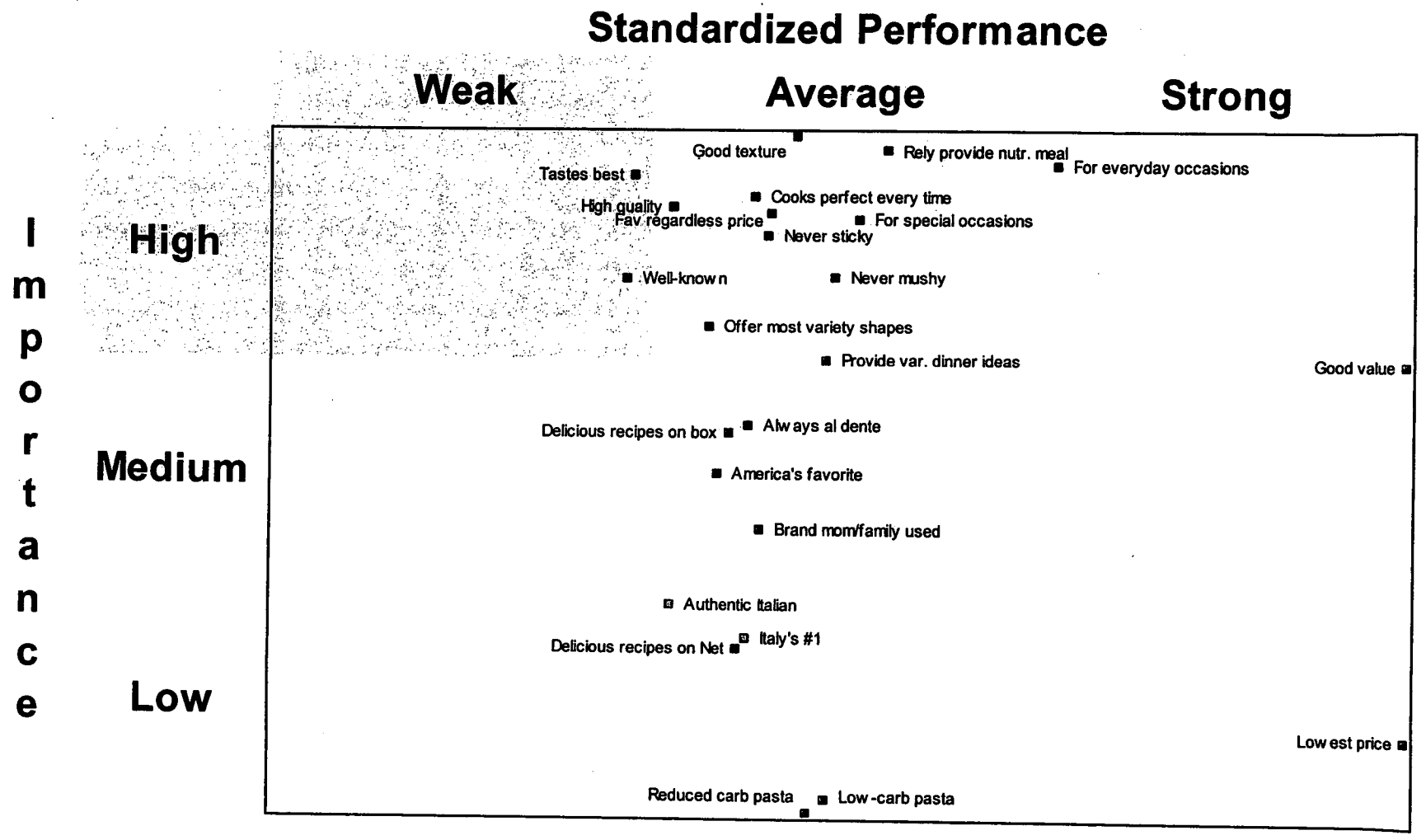
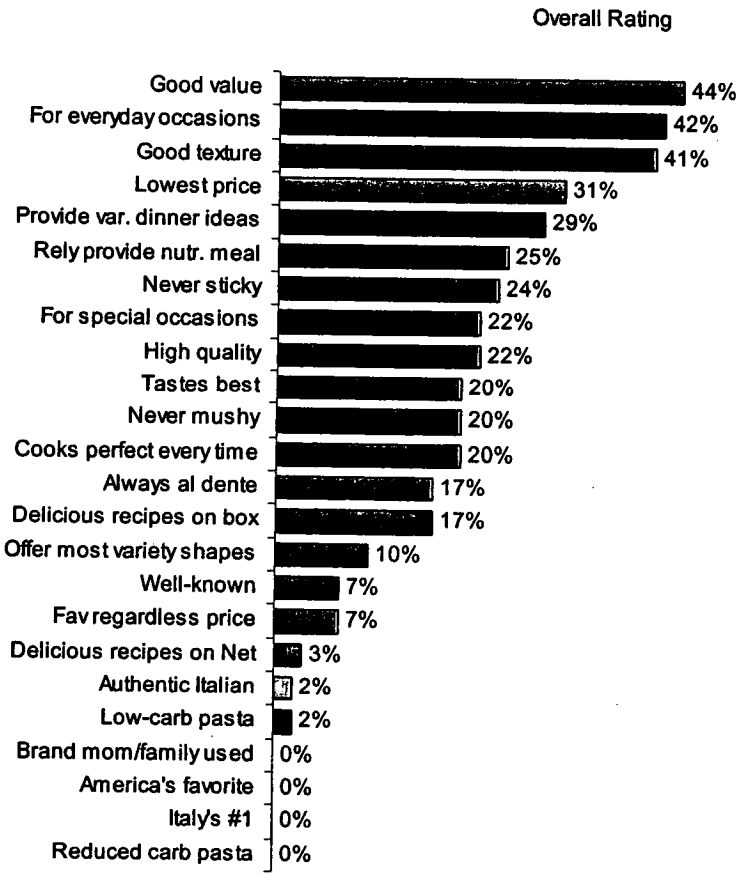
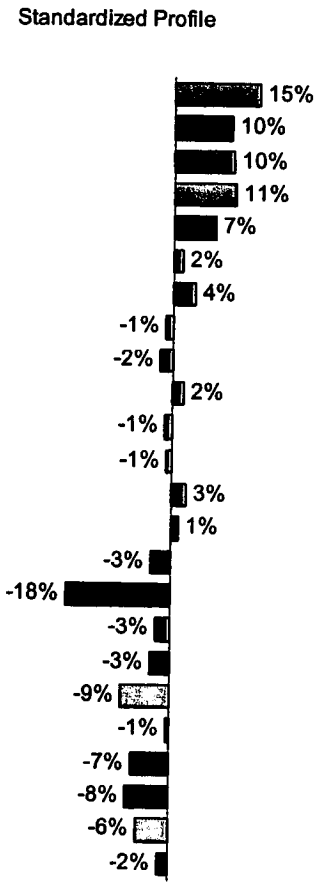


Image Profile – Private Selection





Strategic Matrix – Private Selection

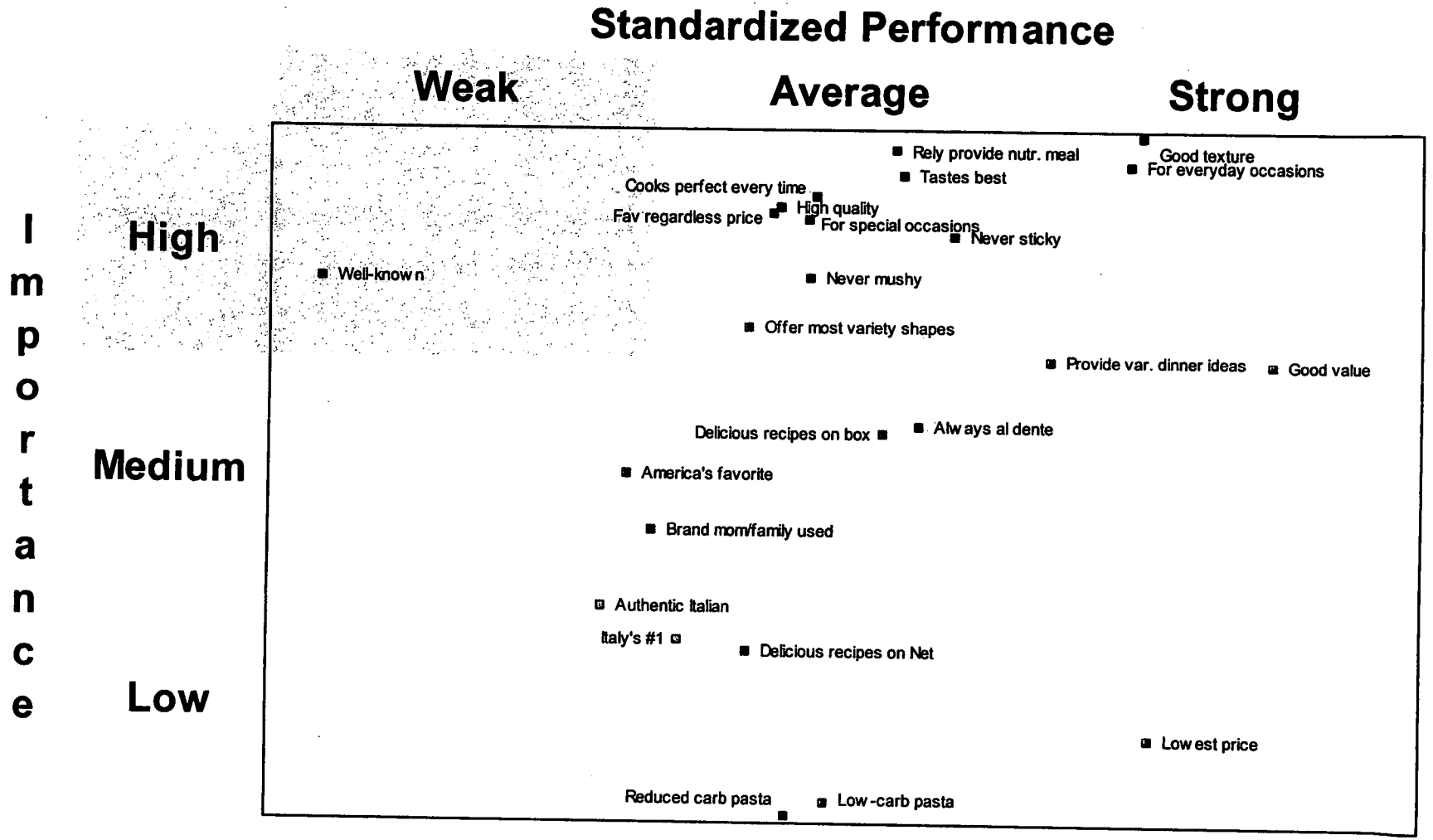
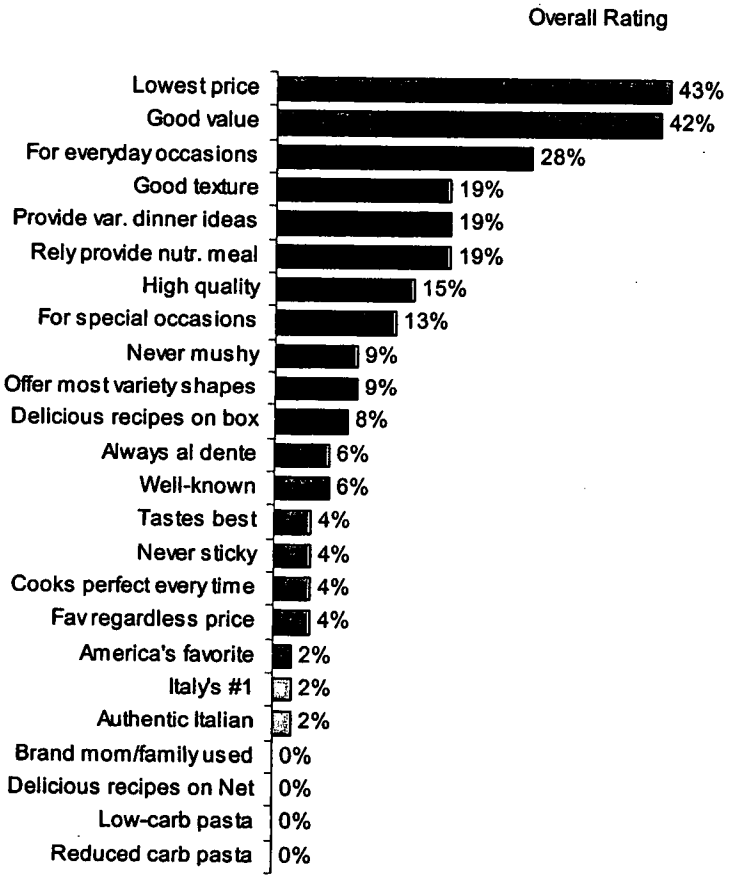
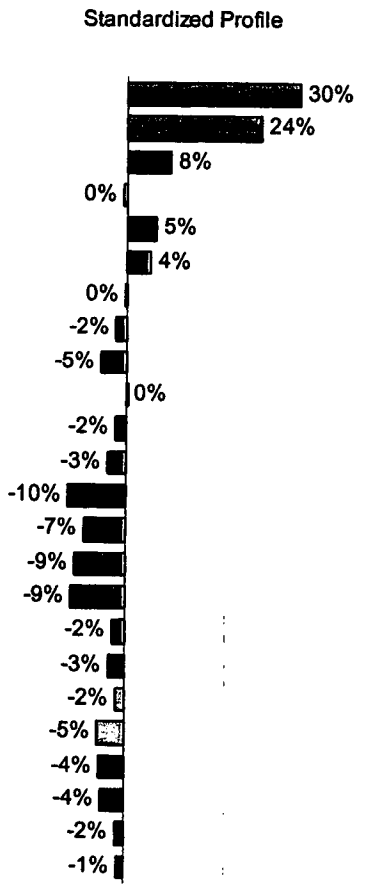


Image Profile – Albertsons





Strategic Matrix – Albertsons

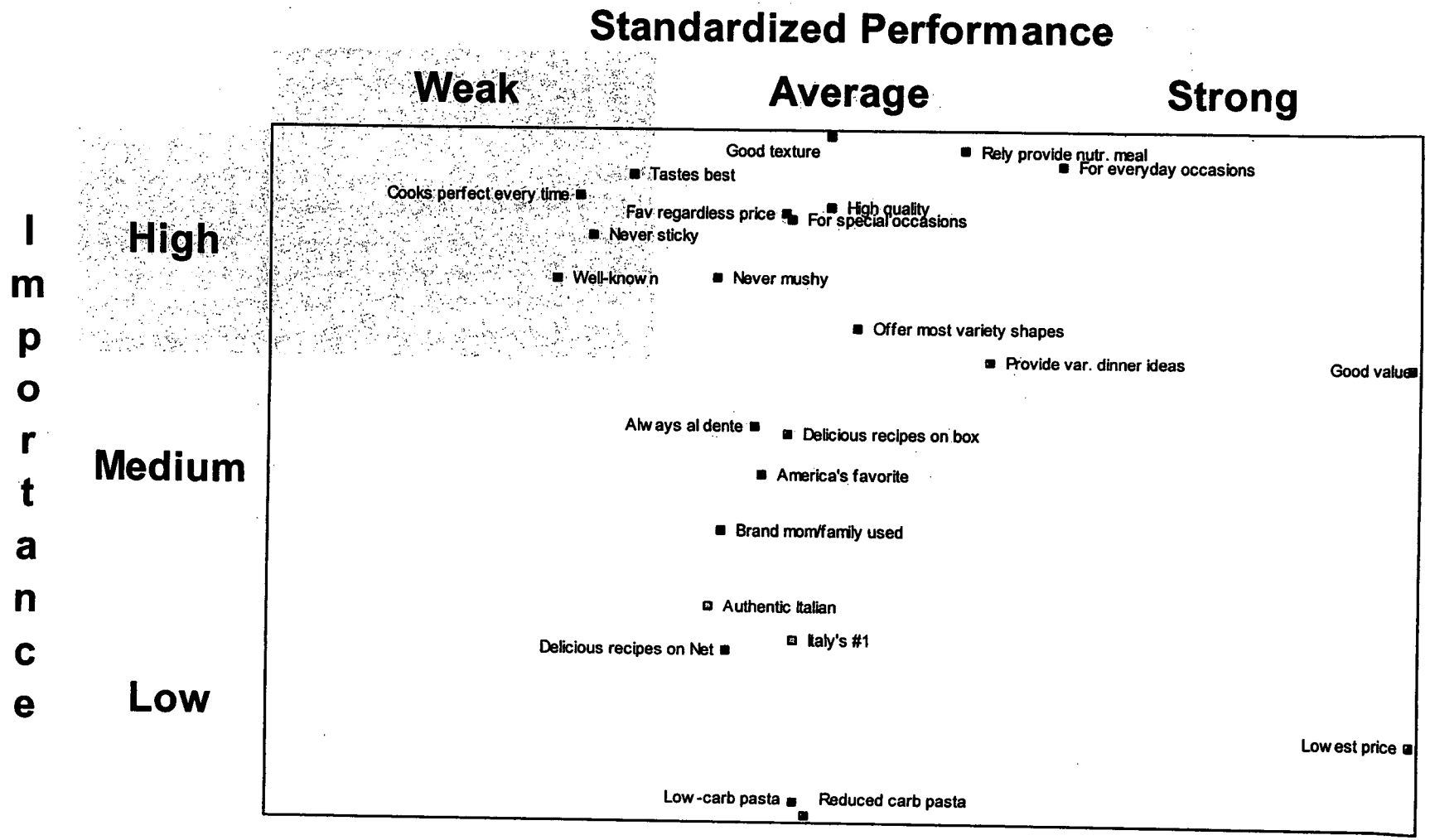
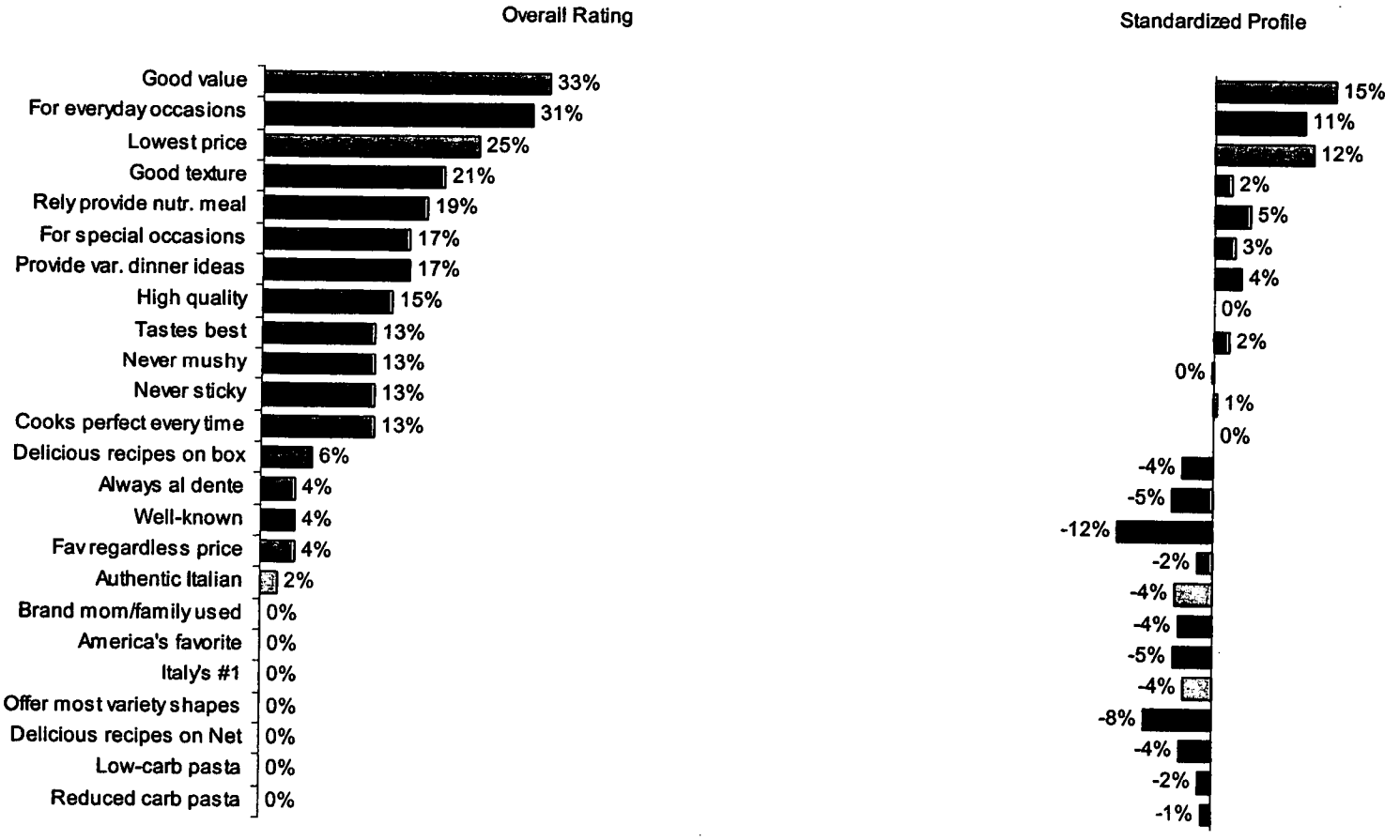
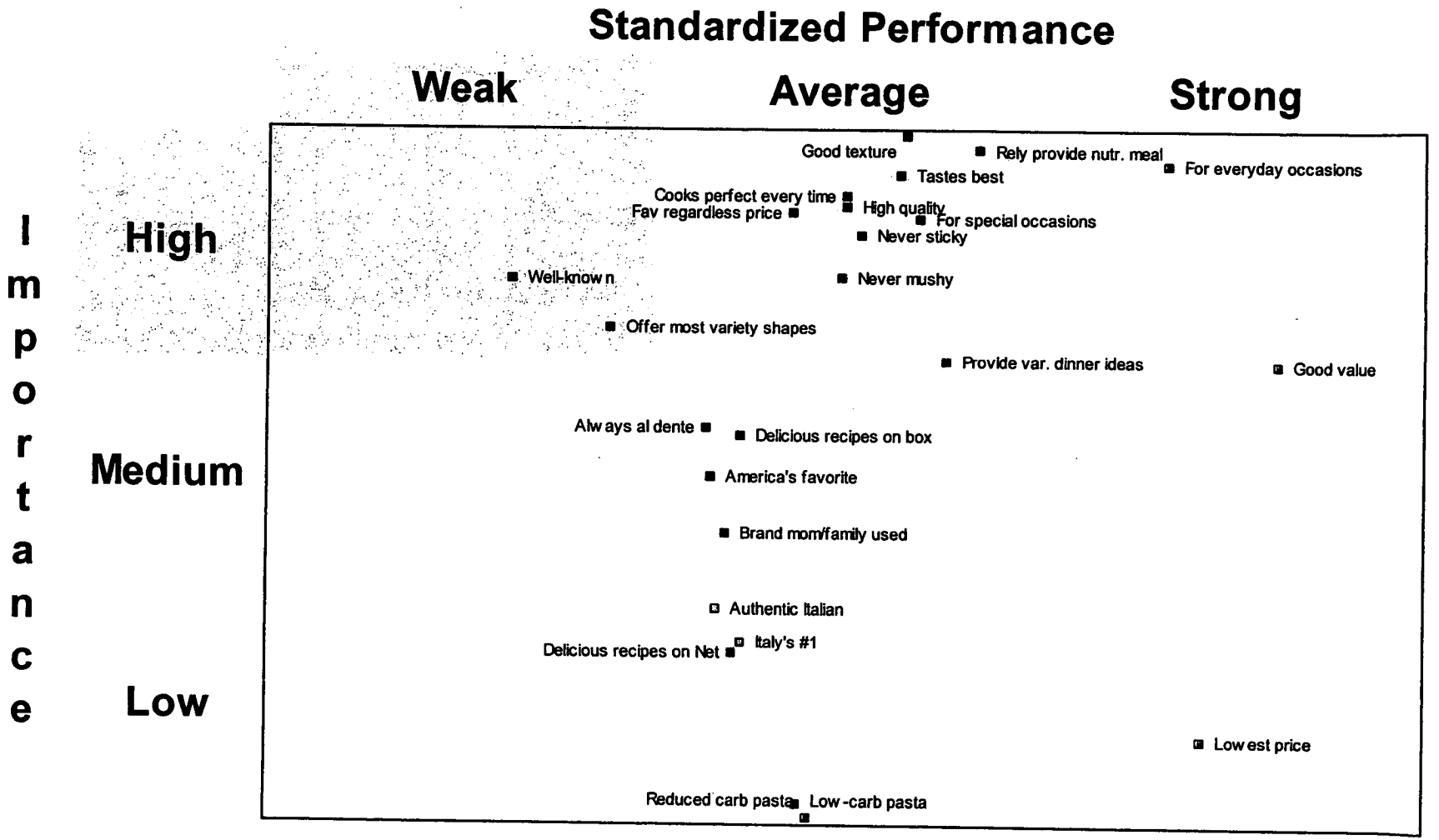


Image Profile – Harris Teeter



Strategic Matrix – Harris Teeter



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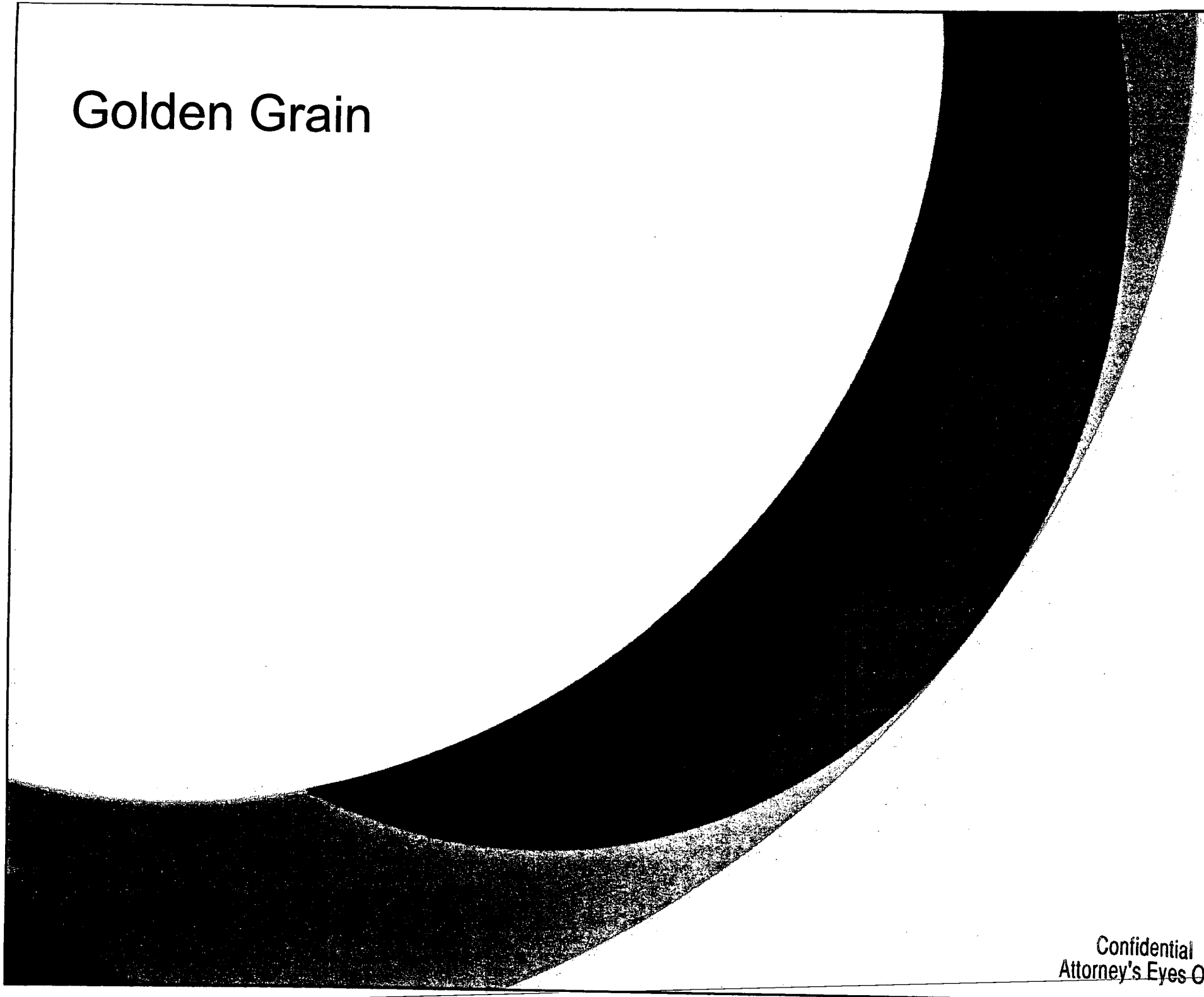
Golden Grain



Golden Grain – Summary

Barilla is a strong brand within the Golden Grain market area.

- Barilla has the highest ad recognition. A small portion of consumers can play back specific elements of Barilla ads, in particular that the ad features Italian men and the mention of authentic Italian pasta. Many consumers can name Barilla as the sponsor of their ad, based on a short description of the ad.
- Barilla obtains the highest share of purchases and is most often named consumers' preferred brand of pasta.
- Barilla has the highest top box satisfaction ratings of any brand.
- Consumers associate Barilla with being an authentic Italian pasta and for being Italy's #1 pasta.
    - This is true despite the fact that two other brands in the market, Da Vinci and De Cecco, also are positioned as authentic Italian pastas. Barilla is still the brand with the ***most*** heritage and authenticity.

Golden Grain is also a strong brand in this market area, though not quite as strong as Barilla.

- Golden Grain has the highest unaided brand awareness of any brand in the market area.
- Golden Grain has the second highest reported ad awareness, but awareness is still only two-thirds that of Barilla.
    - In addition, consumers cannot play back any specific elements of the Golden Grain advertising.
- Satisfaction ratings for Golden Grain are far below that of Barilla but still above those achieved by American Beauty (the next strongest brand).
    - Golden Grain interacts with the American Beauty brand more so than the Barilla brand. That is, users of Golden Grain also tend to purchase American Beauty and vice versa.
    - In addition, perceptually Golden Grain is most similar to the American Beauty brand.

Golden Grain performs extremely well on the most important attribute: being a well-known brand.

- However, Golden Grain does not outperform competition for having a Consistent Taste & Texture. Here, rather, the brand generally performs average.

Golden Grain: Demographic Profile by Category Usage

Within the Golden Grain sales territory, heavy users of dry pasta tend to be married, have some college education, to have a female head of household who is not working, and come from larger households than medium/light users.

Golden Grain: Demographic Profile by Category Usage (continued)

Base: Total Respondents	Total Golden Grain	Category Usage: Heavy	Medium	Light
	(300)	(61)*	(75)*	(160)
	A	B	C	D
	%	%	%	%
Mean Age	40.3	41.1	40.8	39.7
Marital Status				
Married	72	82 D	79 D	66
Single (Net)	28	18	21	34 BC
Never married	14	7	5	21 BC
Divorced/separated	12	11	16	10
Widowed	2	-	-	4 C
Employment of Female Head of Household				
Employed (Net)	73	64	71	78 B
Full time	61	54	55	67 BC
Part time	12	10	16	11
Not Employed (Net)	25	33 D	27	21
Retired	1	2	1	1
Homemaker	21	26	21	18
Other	3	5	4	1
Not specified	2	3	3	2
Education				
High School Graduate	8	3	9	9
Some College	39	51 CD	35	36
College Graduate	39	33	40	41
Post Graduate	14	13	16	13
Mean Household Income (in 000s)	77.3	80.7	78.0	75.8
Mean Household Size	3.1	4.0 CD	3.3 D	2.7
Mean Number of Children in Household Under 18	1.9	2.1 D	1.8	1.7
Race of Female Head of Household				
White	86	90	87	84
Non-White (Net)	11	7	11	13
Black	2	2	3	1
Asian/Pacific Islander	7	2	5	9 B
Other	3	3	3	3
Not specified	3	3	3	3

Q. S3: Please indicate your age.
Q. S6: What is the highest level of education you have completed?
Q. S5: Which of the following best describes your total yearly household income?
Columns tested: B/C/D. Capital letters indicate differences at the 90% confidence level.
Marital status, employment, household size, number of children, and race of female head of household obtained from panel data.

Golden Grain
Advertising Awareness and Recall

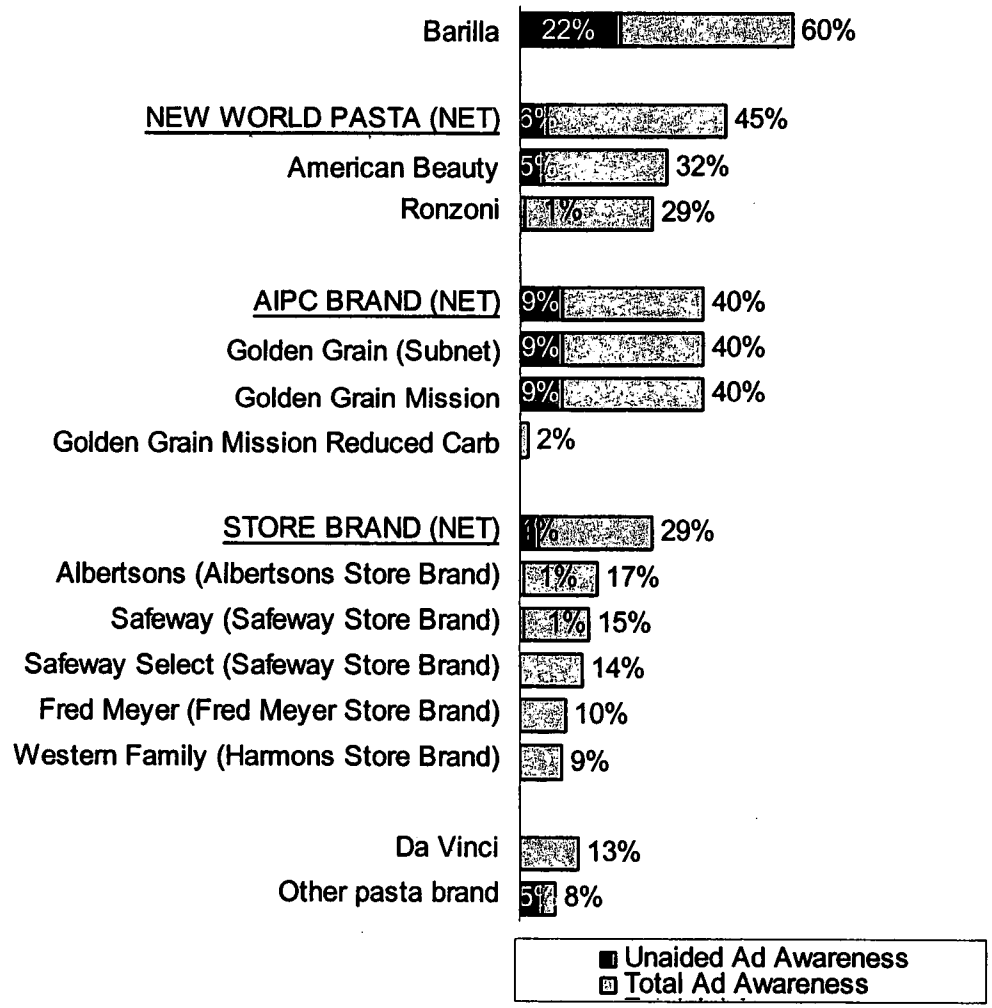
Golden Grain: Ad Awareness

Barilla is clearly the brand with the highest reported ad recognition.

Golden Grain has the second highest reported ad awareness, but total awareness is only two-thirds that of Barilla (40% vs. 60%, respectively).

Awareness of advertising for each of the individual New World Pasta brands is lower than that of Golden Grain.

Golden Grain: Ad Awareness (continued)



Q. 2 Which brands of packaged dry pasta have you seen or heard advertised in the PAST MONTH?
Q. 4 You may have already mentioned dry pasta brands you have seen or heard advertised. Using the list below, please indicate ALL dry pasta brands have you EVER HEARD OR SEEN ADVERTISED, including those brands you may have already mentioned.
Only mentions of 7 or more in either column shown except for AIPC brands which are all listed.

Golden Grain: Where Saw Advertisement

The vast majority of consumers who remember seeing advertisements for Barilla claim that they remember seeing such ads on TV.

- Few consumers name any other source for Barilla ads.

Consumers remember seeing Golden Grain, American Beauty, Ronzoni, and DaVinci ads on television, in newspapers, and in magazines (in that order). Ads for Store Brands are run primarily in newspapers.

Base: Those Aware of Advertisement	Golden Grain (119) A %	Barilla (180) C %	American Beauty (92)* E %	Ronzoni (86)* J %	Store Brand (Net) (83)* M %	Albertsons (51)* N %	Safeway Select (Net) (41)* O %	Safeway (45)* P %	Fred Meyer (31)* Q %	Da Vinci (39)* R %
TV	42 Q	78 QR	35 NPQ	36 NPQ	20	16	22	13	10	31 NPQ
Saw it in store	8 C	2	4	6 C	25	18 JR	24 JR	29 JR	13 CE	5
Radio	5	6 EJN	1	1	1	-	-	2	3	-
Newspaper	28 C	14	30 C	23 C	47	51 JR	46 JR	49 JR	65 JR	21
Magazine	19 Q	11 Q	15 Q	16 Q	1	-	-	-	-	18 Q
Internet	3	2	2	-	6	4 J	-	-	3 J	-
Friend/relative/business associate	2	3	2	5	10	4	-	2	3	-
Not sure	14	8	25 AC	24 AC	19	20 C	15	13	13	36 Q

Q. 5A For each brand you have heard or seen advertised, please indicate where you saw or heard the advertising for each brand.
Q. 5B What other place did you see or hear [INSERT BRAND] advertised?
Columns tested: A/C/E/J/M/N/O/P/Q/R. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
Brands not listed have base sizes too small to analyze.
Only mentions of 3% or more in any column shown.

Golden Grain: Ad Recall and Communication

Roughly one in ten consumers who recall seeing a Barilla ad remember that the ad featured Italian men/people and that the brand offers authentic Italian pasta.

Ad recall for store brands is heavily focused on pricing, specifically sale items.

For all remaining brands – including Golden Grain – there are no particular ad elements that are especially memorable to consumers.

Golden Grain: Ad Recall and Communication (continued)

Base: Those Aware of Advertisement	Golden Grain	Barilla	American Beauty	Ronzoni	Store Brand (Net)	Albertsons	Safeway Select	Safeway	Fred Meyer	Da Vinci
	(119)	(180)	(92)*	(86)*	(83)*	(51)*	(41)*	(45)*	(31)*	(39)*
	%	%	%	%	%	%	%	%	%	%
AD RECALL (NET)	17	36	15	15	36	27	15	20	23	10
Sale ad	1	-	1	1	11	6	-	-	6	-
Seeing it in store	3	-	4	3	12	6	5	13	6	5
Specifics of Barilla TV ad recalled	-	12	-	-	-	-	-	-	-	-
Italian people/man/Italy	-	10	1	1	-	-	-	-	-	-
All other ad recall mentions	5	9	4	2	5	6	3	4	-	-
BRAND (NET)	10	7	8	10	3	2	3	-	-	10
Barilla name/brand name	9	7	8	9	3	2	-	-	-	10
PACKAGING (NET)	2	3	5	8	-	-	5	-	-	5
Package (unsp)	-	-	3	7	-	-	-	-	-	-
PASTA (NET)	6	18	3	3	-	-	-	-	-	5
Authentic/Italian pasta	-	9	-	1	-	-	-	-	-	5
PRICE/COST (NET)	23	6	22	14	48	49	53	42	39	10
Price/cost (unsp)	3	-	2	2	9	6	5	4	6	-
Sale price	3	1	4	2	4	6	8	2	-	-
Low price	3	-	-	-	13	14	15	7	13	-
On sale	4	2	5	2	19	16	20	22	19	8
Coupon	8	4	10	8	3	2	3	2	-	3
PRODUCT ATTRIBUTES (NET)	3	8	2	2	3	-	3	-	-	5
Cooks well/cooks with perfection	-	7	-	-	1	-	-	-	-	3
MISCELLANEOUS (NET)	4	24	9	14	-	6	-	4	10	5
Doesn't stick together	-	8	-	-	-	-	-	-	-	-
Family/family oriented	-	6	1	1	-	-	-	-	-	-
Comparable to a name brand	-	-	-	-	-	-	-	-	3	-
Don't Know	20	12	24	22	17	6	8	11	16	26
Refused/No Answer	4	1	3	2	4	4	8	4	6	3
None/nothing	19	3	14	16	17	10	13	18	10	21

Q. 5C What SPECIFICALLY do you recall seeing or hearing about the pasta advertising for [INSERT BRAND]?
Stats testing not appropriate on open-ended questions.
* Caution: small base size.
Brands not listed have base sizes too small to analyze.
Only mentions of 7% or more in any column shown.

Golden Grain: Recognition of AIPC Brands' Advertising

Roughly one-third of consumers report being aware of an ad featuring a family eating a pasta meal or one that gives quick and easy pasta meal ideas (AIPC's ads).

- However, among those that claim awareness, fewer than one in ten associate the description of the ad with Golden Grain. Typically, Barilla is credited with running the ad.

Among consumers who are aware of Golden Grain's advertising, less than two in ten are aware of the phrase 'Golden Grain makes the meal, you made the difference'.

Findings are similar across brand user groups. That is, Golden Grain users are no more likely to remember the ads.

Golden Grain: Recognition of AIPC Brands' Advertising (continued)

	Total Golden Grain	Past 6 Months Brand Usage				
		Golden Grain	Barilla	American Beauty	Ronzoni	Store Brand (Net)
	A	L	M	N	O	P
Whether Remember AIPC Ad Based on Description	%	%	%	%	%	%
Base - Those Aware of Any Advertisement	(233)	(98)*	(102)	(96)*	(50)*	(133)
Yes	36	43	39	40	40	43
No	64	57	61	60	60	57
Brand Associated With Advertisement						
Base - Those Aware of Any Advertisement and Recall AIPC Ad	(85)*	(42)*	(40)*	(38)*	(20)**	(57)*
Barilla	32	31	33	24		33
AIPC BRAND (NET)	9	12	5	11		7
Golden Grain (Subnet)	9	12	5	11		7
Golden Grain Mission	9	12	5	11		7
NEW WORLD PASTA (NET)	7	5	5	11		7
American Beauty	4	2	-	5		4
Ronzoni	4	2	5	5		4
None/nothing	5	7	5	3		5
Don't Know/Remember	38	31	43	45		35
Aided Awareness of Golden Grain Slogan						
Base - Those Aware of Golden Grain Advertisement	(119)	(65)*	(44)*	(57)*	(25)**	(71)*
Yes	17	12	20	16		15
No	83	88	80	84		85

Q. 6A Do you remember seeing a pasta advertisement featuring a family eating a pasta meal or one that gives quick and easy pasta meal ideas?
Q. 6B What brand of pasta was being advertised?
Q. 6C Have you heard of the phrase [INSERT AIPC BRAND] MAKES THE MEAL, YOU MAKE THE DIFFERENCE in a pasta advertisement?
Columns tested: L/M/N/O/P. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
** Base size too small to analyze.
Only mentions of 5% or more in any column shown (for Q. 6B).
Stats testing not appropriate on open-ended questions (Q. 6B).

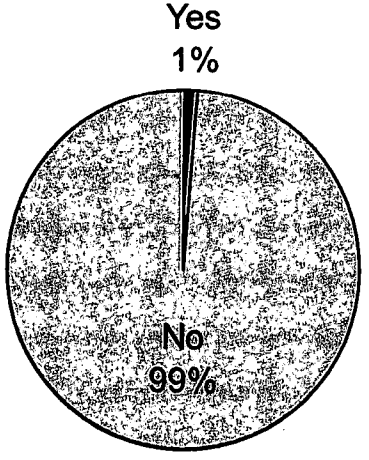
Golden Grain: Aided Awareness of AIPC Website

Only 1% of consumers are aware of www.makesameal.com.

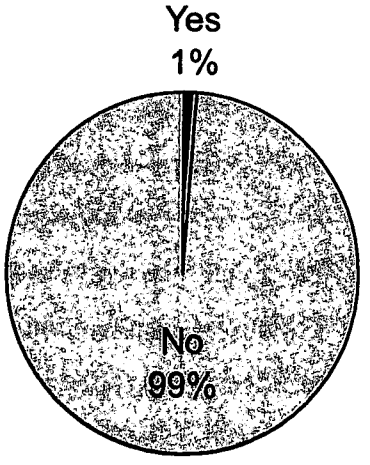
- Awareness is equally low among past 6 month Golden Grain users.

Whether Heard About or Visited Makesameal.com

Total Golden Grain



Past 6 Months Golden Grains Users



Q. 6D Have you heard about or visited the web site MakesaMeal.com?
NOTE: Base sizes for frequency of visiting AIPC website too small to analyze.

Golden Grain: Recognition of Barilla Advertising

Recognition of the Barilla advertising is fairly strong in this region, as four in ten consumers are aware of the Barilla ad featuring authentic Italian recipes. This awareness level is similar to that achieved by the Golden Grain ad.

- Here, however, consumers clearly associate the ads with Barilla, as six in ten consumers can name Barilla as the sponsor.

		Past 6 Months Brand Usage				
	Total Golden Grain	Golden Grain	Barilla	American Beauty	Ronzoni	Store Brand (Net)
	A	L	M	N	O	P
	%	%	%	%	%	%
Whether Remember Barilla Ad Based on Description						
Base - Those Aware of Any Advertisement	(233)	(98)*	(102)	(96)*	(50)*	(133)
Yes	40	40	37	36	40	45
No	60	60	63	64	60	55
Brand Associated With Advertisement						
Base - Those Aware of Any Advertisement and Recall Barilla Ad	(93)*	(39)*	(38)*	(35)*	(20)**	(60)*
Barilla	59	67	76	49		60
NEW WORLD PASTA (NET)	5	5	3	6		8
Ronzoni	3	3	3	3		5
Da Vinci	3	-	-	6		3
AIPC BRAND (NET)	2	3	3	3		2
Golden Grain (Subnet)	2	3	3	3		2
Golden Grain Mission	2	3	3	3		2
Other pasta brand	4	3	3	6		5
None/nothing	4	3	5	3		2
Don't Know/Remember	22	21	11	29		20

Q. 7A Do you remember any type of pasta advertising featuring authentic Italian recipes and pasta from Italy?
Q. 7B What brand was being advertised?
Columns tested: L/M/N/O/P. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
** Base size too small to analyze.
Only mentions of 5% or more in any column shown (for Q. 7B).
Stats testing not appropriate on open-ended questions (Q. 7B).

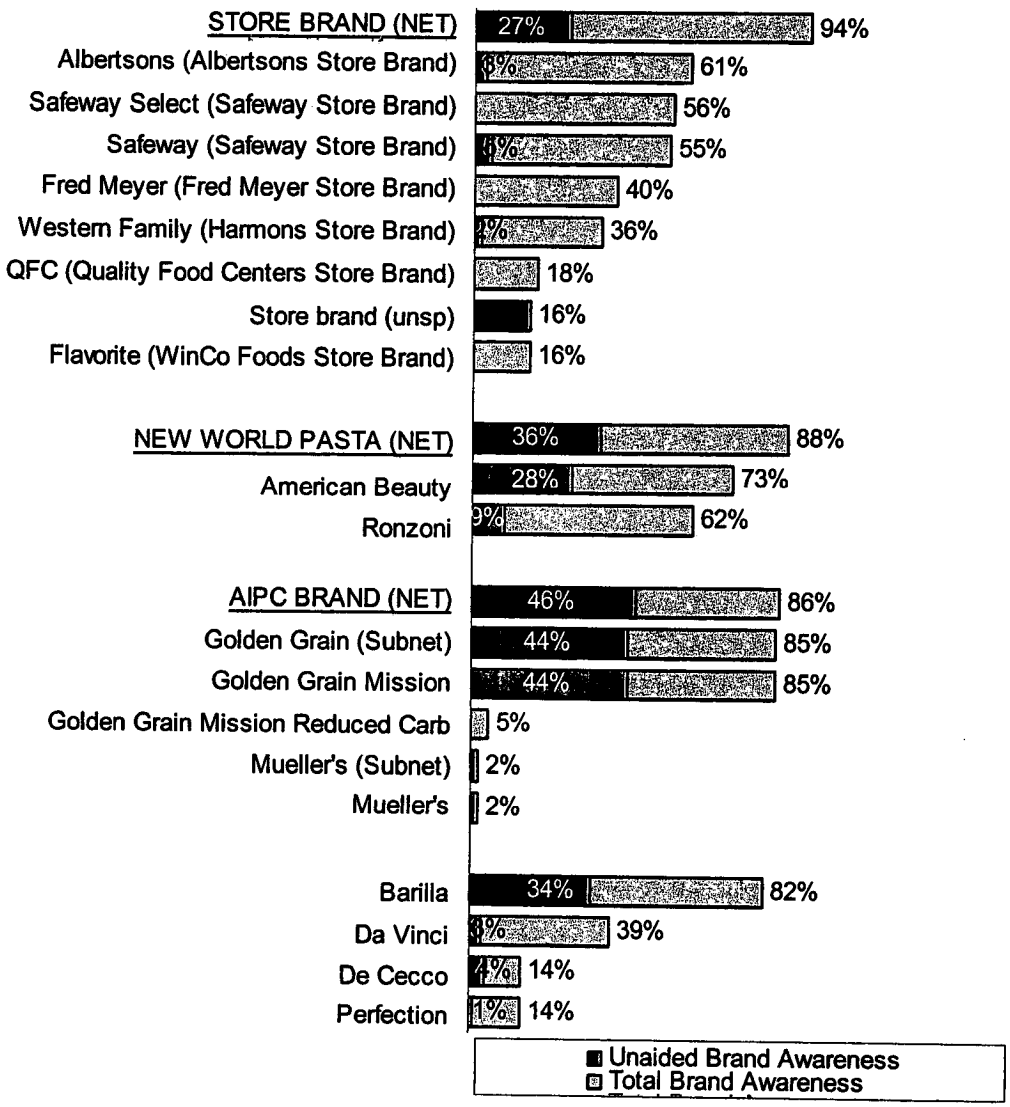
Golden Grain Brand Awareness and Purchase Behavior

Golden Grain: Brand Awareness

Golden Grain and Barilla are the brands with the highest overall brand awareness, followed by the New World Pasta Brands.

- Among the New World Pasta brands, consumers are most familiar with the American Beauty brand. Ronzoni also has fairly strong awareness.
- Golden Grain has the highest unaided awareness of any brand.

Golden Grain: Brand Awareness (continued)



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Q. 1 Thinking about brands of packaged dry pastas, which pasta brands come to mind?
Q. 3 You may have already mentioned some dry pasta brands you have heard of. Using the list below, please indicate ALL of the following dry pasta brands you have EVER heard of, including those brands you may have already mentioned.
Only brands with mentions of 7% or more in either column shown except for AIPC brands which are all listed. Only store brands with 15% or more total awareness shown.

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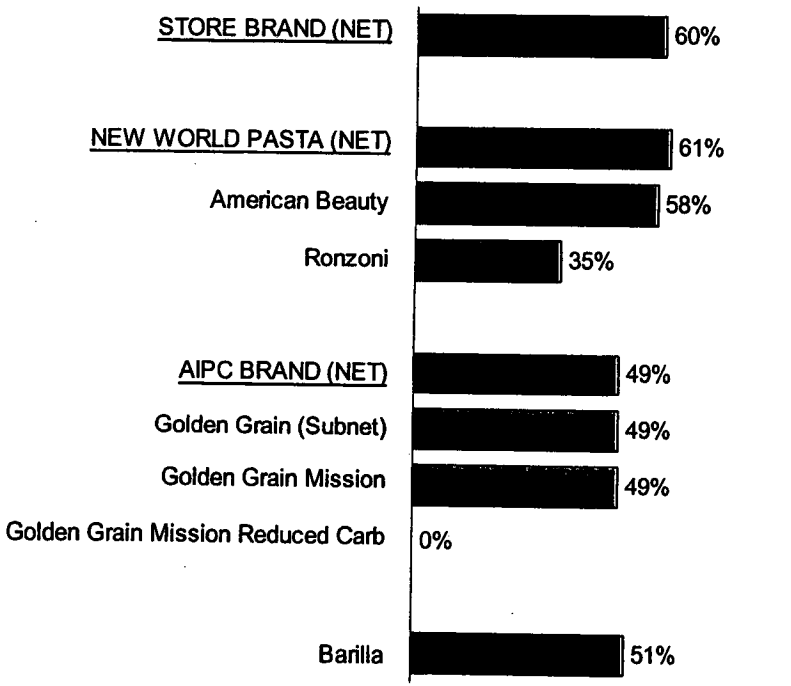
Golden Grain: Awareness-To-Purchase Conversion Rates

Awareness-to-purchase conversion rates (that is, the percentage of people aware of a brand who have also purchased it in the past 6 months) are highest for the New World Pasta brand, American Beauty.

- Nearly six in ten of those aware of the brand report purchasing it in the past 6 months.

Conversion rates for Golden Grain Mission are similar to that of Barilla (roughly 50%).



	Total Brand Awareness	% Purchased Past 6 Months
STORE BRAND (NET)	94	56
NEW WORLD PASTA (NET)	88	53
American Beauty	73	42
Ronzoni	62	22
AIPC BRAND (NET)	86	42
Golden Grain (Subnet)	85	42
Golden Grain Mission	85	42
Golden Grain Mission Reduced Carb	5	0
Barilla	82	42

Q. 1 Thinking about brands of packaged dry pastas, which pasta brands come to mind?
Q. 3 You may have already mentioned some dry pasta brands you have heard of. Using the list below, please indicate ALL of the following dry pasta brands you have EVER heard of, including those brands you may have already mentioned.
Q. 8A Which of the following pasta brands have you purchased in the PAST 6 MONTHS?
Only AIPC brands and major competitors listed.
Conversion ratio calculated as follows: % Purchased Past 6 Months/Total Brand Awareness x 100.

Golden Grain: Past 6 Months Cross-Brand Purchasing

Golden Grain purchasers are very likely to have also purchased American Beauty pasta in the past 6 months.

- Golden Grain interacts with the American Beauty brand more so than the Barilla brand.

		Past 6 Months Brand Usage				
	Total Golden Grain	Golden Grain	Barilla	American Beauty	Ronzoni	Store Brand (Net)
Base: Total Respondents	(300)	(126)	(126)	(126)	(65)*	(167)
	A	L	M	N	O	P
	%	%	%	%	%	%
STORE BRAND (NET)	56	60 MO	43	62 MO	46	100 LMN O
Albertsons (Albertsons Store Brand)	18	22 M	10	25 M	18 M	32 LMO
Safeway (Safeway Store Brand)	14	17 O	13	17 O	8	26 LMN O
Safeway Select (Safeway Store Brand)	14	16	13	13	11	26 LMN O
Fred Meyer (Fred Meyer Store Brand)	9	10 M	4	10 M	11 M	16 M
Flavorite (WinCo Foods Store Brand)	6	5	6	10 L	11	10 L
Western Family (Harmons Store Brand)	5	3	2	5	3	9 LM
NEW WORLD PASTA (NET)	53	57	51	100 LMP	100 LMP	52
American Beauty	42	47 M	35	100 LMOP	51 M	47 M
Ronzoni	22	25	29 P	26 P	100 LMNP	18
Barilla	42	39	100 LNOP	35	57 LNP	32
AIPC BRAND (NET)	42	100 MNO P	39	47	49	46
Golden Grain (Subnet)	42	100 MNO P	39	47	49	46
Golden Grain Mission	42	100 MNO P	39	47	49	46
Golden Grain Mission Reduced Carb	0	1	1	1	-	-
Da Vinci	7	10	8	8	12 P	5

Q. 8A Which of the following pasta brands have you purchased in the PAST 6 MONTHS?
Columns tested: L/M/N/O/P. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
Only mentions of 7% or more in any column shown except for AIPC brands which are all listed.

Golden Grain: Brands Purchased Most Recently

Barilla, Golden Grain, and American Beauty are all named with roughly equal frequency when consumers are asked which brands of pasta they purchased most recently.

		Category Usage		
	Total Golden Grain	Heavy	Medium	Light
Base: Total Respondents	(300)	(61)*	(75)*	(160)
	A	B	C	D
	%	%	%	%
STORE BRAND (NET)	32	30	32	34
Albertsons (Albertsons Store Brand)	9	15 D	13 D	6
Safeway (Safeway Store Brand)	8	8	4	9
Safeway Select (Safeway Store Brand)	6	2	7	7
Fred Meyer (Fred Meyer Store Brand)	4	3	5	3
NEW WORLD PASTA (NET)	26	30	31	22
American Beauty	19	23	20	16
Ronzoni	8	8	12	6
Barilla	24	25	21	24
AIPC BRAND (NET)	20	21	32 D	14
Golden Grain (Subnet)	20	21	32 D	14
Golden Grain Mission	20	21	32 D	14
Golden Grain Mission Reduced Carb	0	-	1	-
Da Vinci	3	5	5	2
De Cecco	2	5 D	4 D	-

Q. 9 Which of the following pasta brands have you purchased most recently?
Columns tested: B/C/D. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
Only mentions of 5% or more in any column shown except for AIPC brands which are all listed.

Golden Grain: Frequency of Purchasing On Sale or With Coupon

Ronzoni is the brand least likely to have been purchased on sale or with a coupon.

Base: Those Aware of Advertisement	Golden Grain	Barilla	American Beauty	Ronzoni	Store Brand (Net)	Albertsons	Safeway Select (Net)	Safeway
	(126)	(126)	(126)	(65)*	(167)	(53)*	(43)*	(43)*
	A	C	E	J	M	N	O	P
Frequently	40 J	30 J	36 J	18	44	45 CJ	40 J	44 CJ
Occasionally	37	34	39	28	34	28	30	28
Sometimes	14	17	15	32 ACEN	20	15	19	19
Never	10	18 AE	10	22 AEP	12	11	12	9

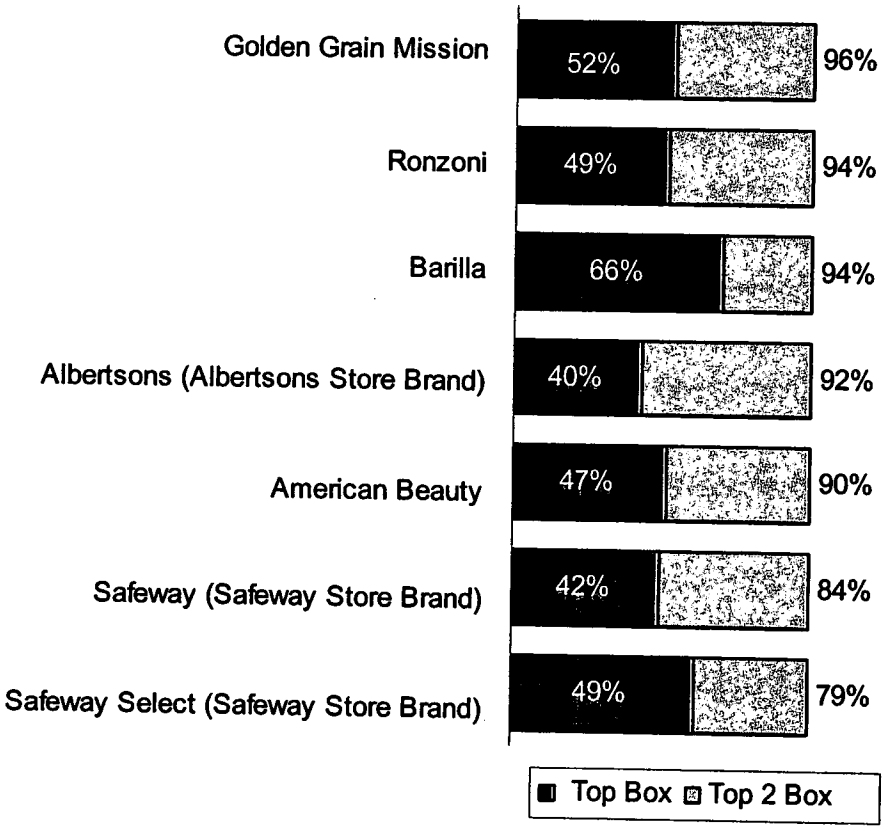
Q. 8B For all the brands you have purchased in the past 6 months, please indicate how often you purchase the brand ON SALE OR WITH A COUPON.
Columns tested: A/C/E/J/M/N/O/P. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
Brands not listed have base sizes too small to analyze.

Golden Grain: Overall Brand Satisfaction

Barilla has, by far, the highest top box satisfaction ratings of any brand. Top box ratings for Golden Grain are far below that of Barilla.

- However, ratings for Ronzoni and American Beauty are slightly lower than those of Golden Grain.

Overall Brand Satisfaction

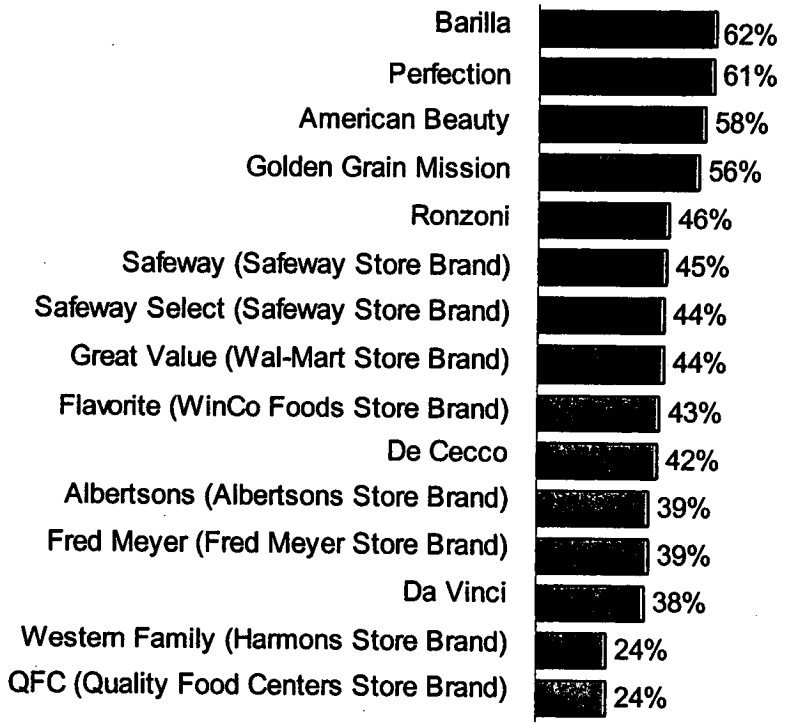


Q. 12 Using the 5-point scale provided, please indicate how satisfied you are with each brand listed.
Base: purchased brand in past 6 months.

Golden Grain: Future Purchase Intent: % Top 2 Box

The three key brands – Barilla, American Beauty, and Golden Grain, all secure strong top two box purchase interest scores.

- However, ratings for Golden Grain are slightly lower than those of Barilla.
- Perfection brand scores equal the major brands.



Q. 11 Using the scale below, please indicate how likely you are to purchase each of the following brands in the next 6 months.
Base: Aware of given brand.

Golden Grain: One Pasta Brand Plan to Purchase Next

A full four in ten consumers report that they make the decision regarding which pasta brand to purchase at the store shelf.

- Of those who have a specific brand in mind, Barilla secures the largest portion of intended next purchases.
- Heavy category users are more likely than light users to say that they intend to purchase Golden Grain at their next pasta purchase.

		Category Usage			
Base: Total Respondents	Total Golden Grain (300) A	Heavy (61)* B	Medium (75)* C	Light (160) D	Likely to Buy Low Carb Pasta (88)* S
	%	%	%	%	%
Barilla	17	16	17	18	17
STORE BRAND (NET)	12	8	12	14	9
Safeway Select (Safeway Store Brand)	3	-	4	4	1
Safeway (Safeway Store Brand)	2	2	-	3	-
Albertsons (Albertsons Store Brand)	2	2	5 D	1	1
Fred Meyer (Fred Meyer Store Brand)	1	3	1	1	2
AIPC BRAND (NET)	10	13	11	9	14
Golden Grain (Subnet)	10	13	11	9	14
Golden Grain Mission	8	13 D	9	6	6
Golden Grain Mission Reduced Carb	2	-	1	3	8
NEW WORLD PASTA (NET)	8	8	9	8	10
American Beauty	6	7	7	5	7
Ronzoni	2	2	3	3	3
De Cecco	2	5 D	4 D	1	-
Da Vinci	2	3	3	1	3
Doesn't matter, I make my decision at the shelf	41	36	40	43	42

Q. 10A Which ONE brand of pasta do you plan to purchase the next time you purchase pasta?
Columns tested: B/C/D. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
Only mentions of 3% or more in any column shown except for AIPC brands which are all listed.

Golden Grain: Brand Most Preferred

Barilla obtains the highest number of votes for preferred brand overall (33%).

- American Beauty and Golden Grain are each preferred by roughly two in ten consumers.

		Category Usage		
Base: Total Respondents	Total Golden Grain	Heavy	Medium	Light
	(300)	(61)*	(75)*	(160)
	A	B	C	D
	%	%	%	%
Barilla	33	31	31	36
NEW WORLD PASTA (NET)	24	26	25	22
American Beauty	18	21	17	17
Ronzoni	6	5	8	5
AIPC BRAND (NET)	20	20	24	18
Golden Grain (Subnet)	20	20	24	18
Golden Grain Mission	20	20	24	18
STORE BRAND (NET)	12	7	8	16 B
Safeway Select (Safeway Store Brand)	4	-	3	6 B
Albertsons (Albertsons Store Brand)	3	7 D	4	1
Safeway (Safeway Store Brand)	2	-	-	3
Da Vinci	4	3	4	4
De Cecco	3	3	5 D	1

Q. 10B Of the following brands you have seen or heard of, please indicate which one brand would be your most preferred brand?
Columns tested: B/C/D. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.
Only mentions of 3% or more in any column shown except for AIPC brands which are all listed.

Golden Grain: General Pasta Brand Attitude

- Most consumers feel that some brands of pasta are better than others and feel it is important to buy one of the better brands.

Base: Total Respondents	Total Golden Grain	Category Usage: Heavy	Category Usage: Medium	Category Usage: Light	Likely to Buy Low Carb Pasta
	(300)	(61)*	(75)*	(160)	(88)*
	A	B	C	D	S
	%	%	%	%	%
Some pasta brands are better than others and it is important that I buy one of those	44	49	52 D	39	49
Some brands are better than others, but it's not that important which brand of pasta I buy	33	31	23	39 C	35
All the pasta brands are about the same, so it doesn't matter to me which one I buy	21	16	25	21	16
One pasta brand is best and it is important to me to always buy that brand	2	3	-	1	-

Q. 14b Using the scale below, please indicate how important each of the following statements are to you when considering which brand of pasta to buy.
Columns tested: B/C/D. Capital letters indicate differences at the 90% confidence level.
* Caution: small base size.

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Golden Grain: Demographic Profile by Brand Users

Users of Barilla pasta tend to have higher annual household incomes than users of other brands. In addition, they are somewhat more likely to be non-White.

Users of American Beauty pasta are older and are more likely to be White.

Brand users of American Beauty, Ronzoni, and Store Brands come from larger households (though they do not necessarily have more children in the household).

Golden Grain: Demographic Profile by Brand Users (continued)

Base: Total Respondents	Total Golden Grain	Past 6 Months Brand Usage: Golden Grain	Barilla	American Beauty	Ronzoni	Store Brand (Net)
	(300)	(126)	(126)	(126)	(65)*	(167)
	A	L	M	N	O	P
	%	%	%	%	%	%
Mean Age	40.3	41.0	39.4	41.2 M	41.2	40.4
Marital Status						
Married	72	70	73	79	77	77
Single (Net)	28	30	27	21	23	23
Never married	14	14	16	10	12	10
Divorced/separated	12	14	9	10	9	10
Widowed	2	2	2	2	2	2
Employment of Female Head of Household						
Employed (Net)	73	75	75	71	72	74
Full time	61	63	66	57	65	60
Part time	12	12	9	14	8	14
Not Employed (Net)	25	23	23	25	23	24
Retired	1	2	1	2	2	2
Homemaker	21	19	20	21	15	20
Other	3	2	2	2	6	2
Not specified	2	2	2	3	5	2
Education						
High School Graduate	8	8	10	10	9	8
Some College	39	43	38	40	37	39
College Graduate	39	38	37	40	40	43
Post Graduate	14	10	16 P	11	14	8
Mean Household Income (in 000s)	77.3	76.3	83.1 LNP	75.2	77.3	75.5
Mean Household Size	3.1	3.1	2.9	3.4 M	3.3 M	3.3 M
Mean Number of Children in Household Under 18	1.9	1.8	1.8	1.8	1.8	2.0
Race of Female Head of Household						
White	86	88	81	89 M	89	90 M
Non-White (Net)	11	10	16 NOP	8	6	8
Black	2	1	2	1	2	1
Asian/Pacific Islander	7	7	10 N	4	3	5
Other	3	2	5	3	2	3
Not specified	3	2	3	3	5	2

Q. S3: Please indicate your age.
Q. S6: What is the highest level of education you have completed?
Q. S5: Which of the following best describes your total yearly household income?
Columns tested: L/M/N/O/P. Capital letters indicate differences at the 90% confidence level.
Marital status, employment, household size, number of children, and race of female head of household obtained from panel data.

Golden Grain
Category Drivers

Golden Grain: Category Drivers

Within the Golden Grain market area, being a well-known brand is most important to consumers.

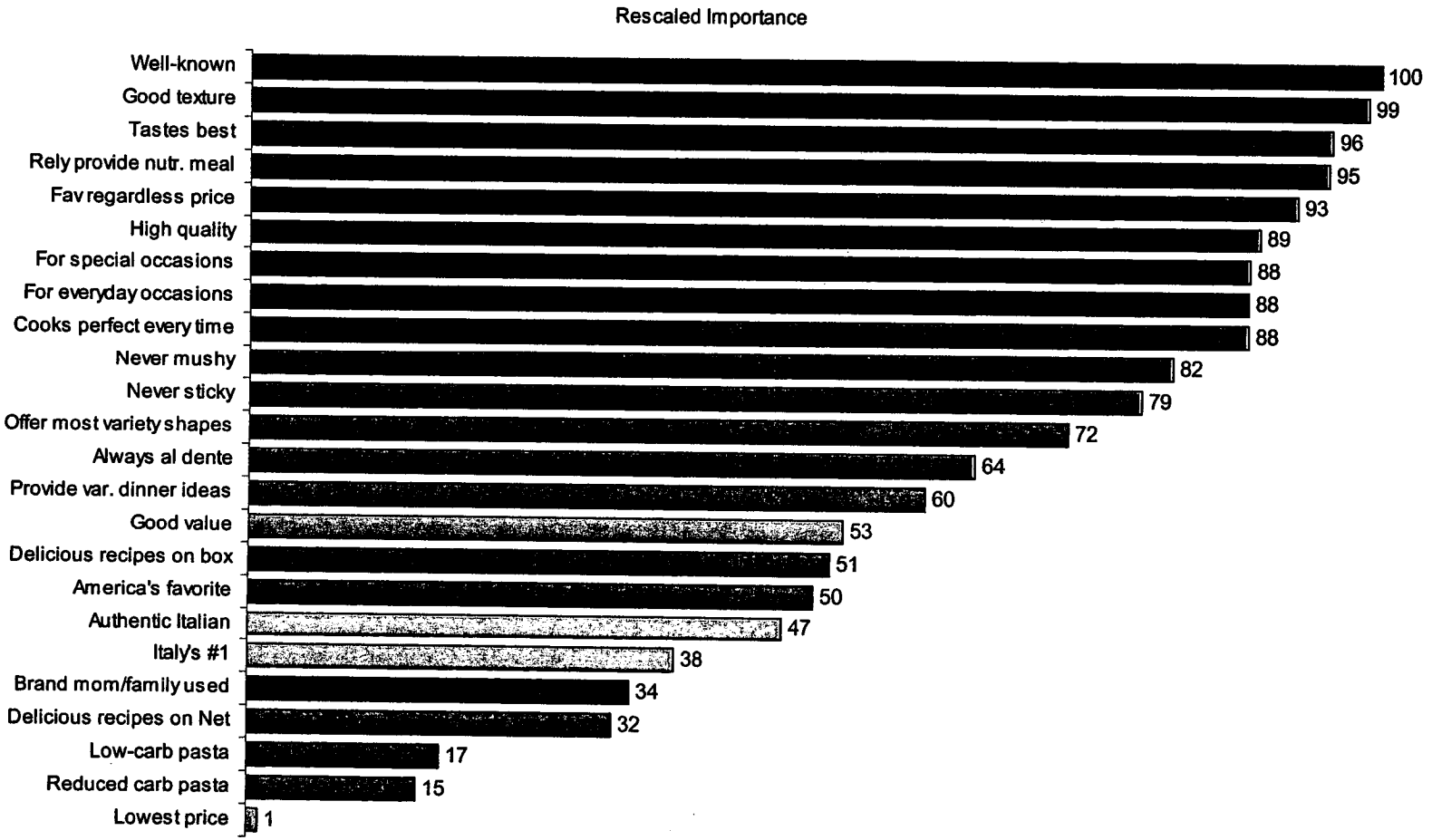
- Another branding-related attribute, the fact that a brand is consumers favorite, regardless of price, is also quite important.

Delivering on Consistent Taste & Texture elements is essential.

- Texture and taste are quite important, as well as being a brand consumers rely on to provide a nutritious meal and being high quality.

Offering the lowest price to consumers is least important.

Importance Hierarchy



Golden Grain
Market Structure

Golden Grain: Market Structure

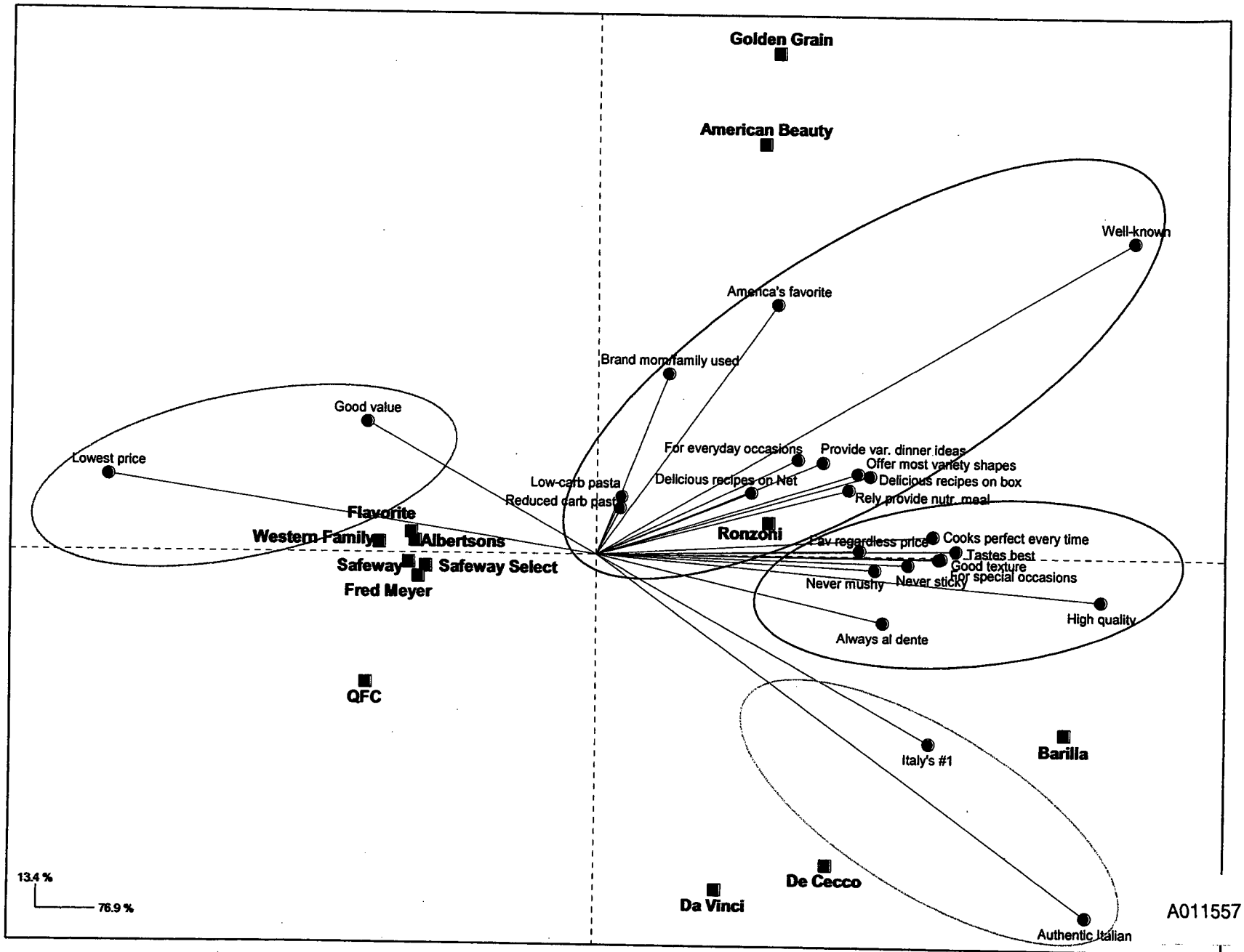
Golden Grain is perceived as being most similar to the American Beauty brand and both are most closely associated with the important elements of Inspiration & Versatility.

- Ronzoni is also aligned with the Inspiration and Versatility elements.

Two other brands besides Barilla (Da Vinci and De Cecco) are associated with elements related to Heritage & Authenticity, though the non-Barilla brands are viewed as more similar to each other than to Barilla.

Store Brands align closely and are associated with attributes related to Price/Value.

Golden Grain



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Golden Grain
Brand Image Analysis

Golden Grain: Brand Image Analysis

In comparison to the competition, Golden Grain performs extremely well on several Inspiration & Versatility attributes.

- It is rated very highly on the most important attribute in this market area: being a well-known brand.
- Other relative strengths vs. competition include being America's favorite pasta and being a brand mom/family used.
- However, Golden Grain does not necessarily have a competitive advantage in the most important area to consumers: Consistent Taste & Texture.
    - On these attributes, it typically performs average to slightly below average.

Similar to findings in other markets, Barilla performs well for its Heritage & Authenticity but not for its Price/Value.

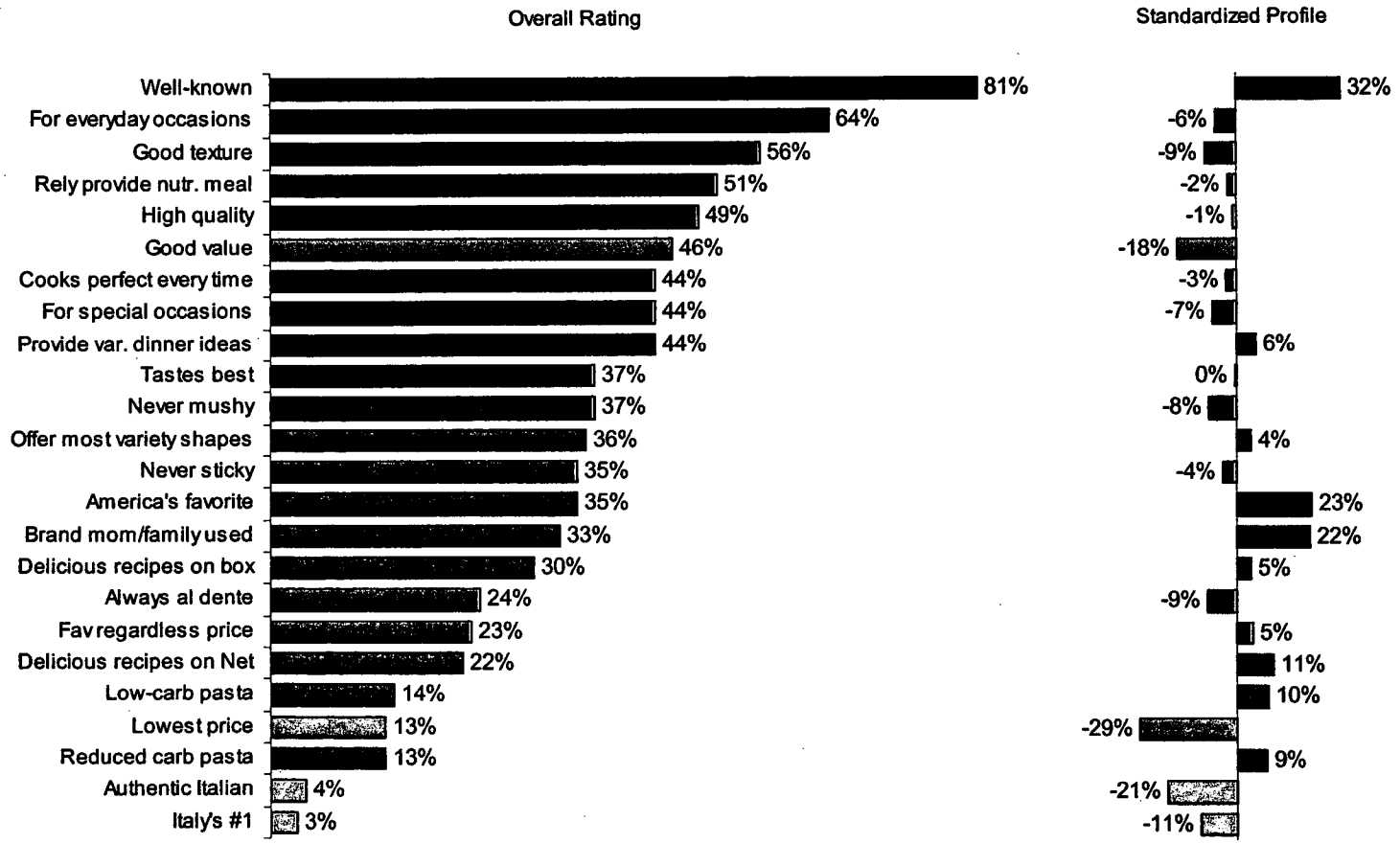
- Despite the fact that DaVinci and DeCecco are both also considered authentic Italian pasta and rated highly for being Italy's #1 pasta, Barilla is still the brand with the most heritage and authenticity.
    - In particular Barilla 'owns' the attribute related to being Italy's #1 pasta.

Likely driven by the brand name, American Beauty pasta is seen as well-known and America's favorite but not as authentic Italian or Italy's #1 pasta.

Ronzoni is well-known, delivers delicious recipes on its box, and comes in a variety of shapes but is not a low price or good value brand.

All Store Brands offer low prices/good value and are seen as appropriate for everyday use.

Image Profile – Golden Grain



Strategic Matrix – Golden Grain

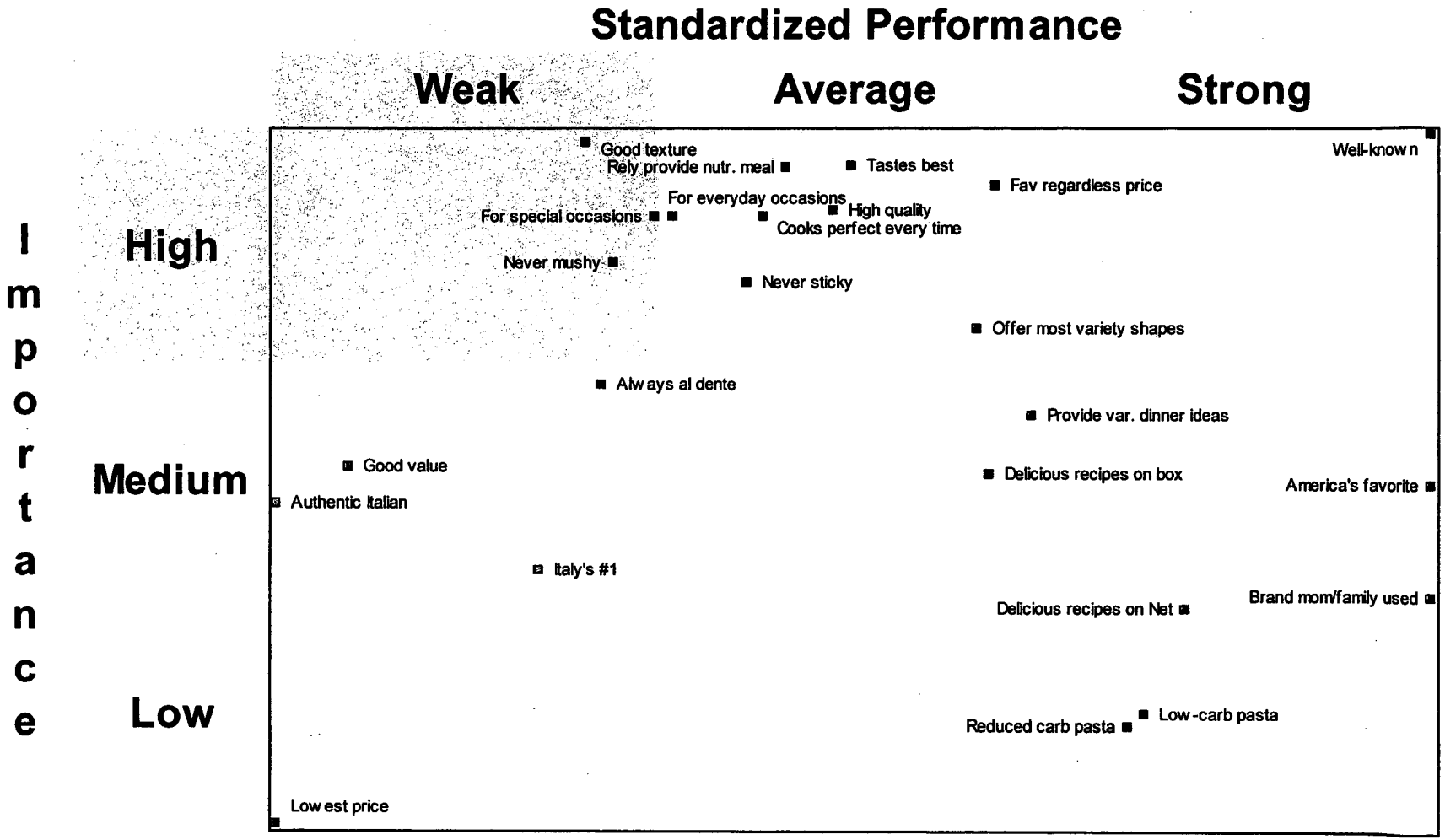
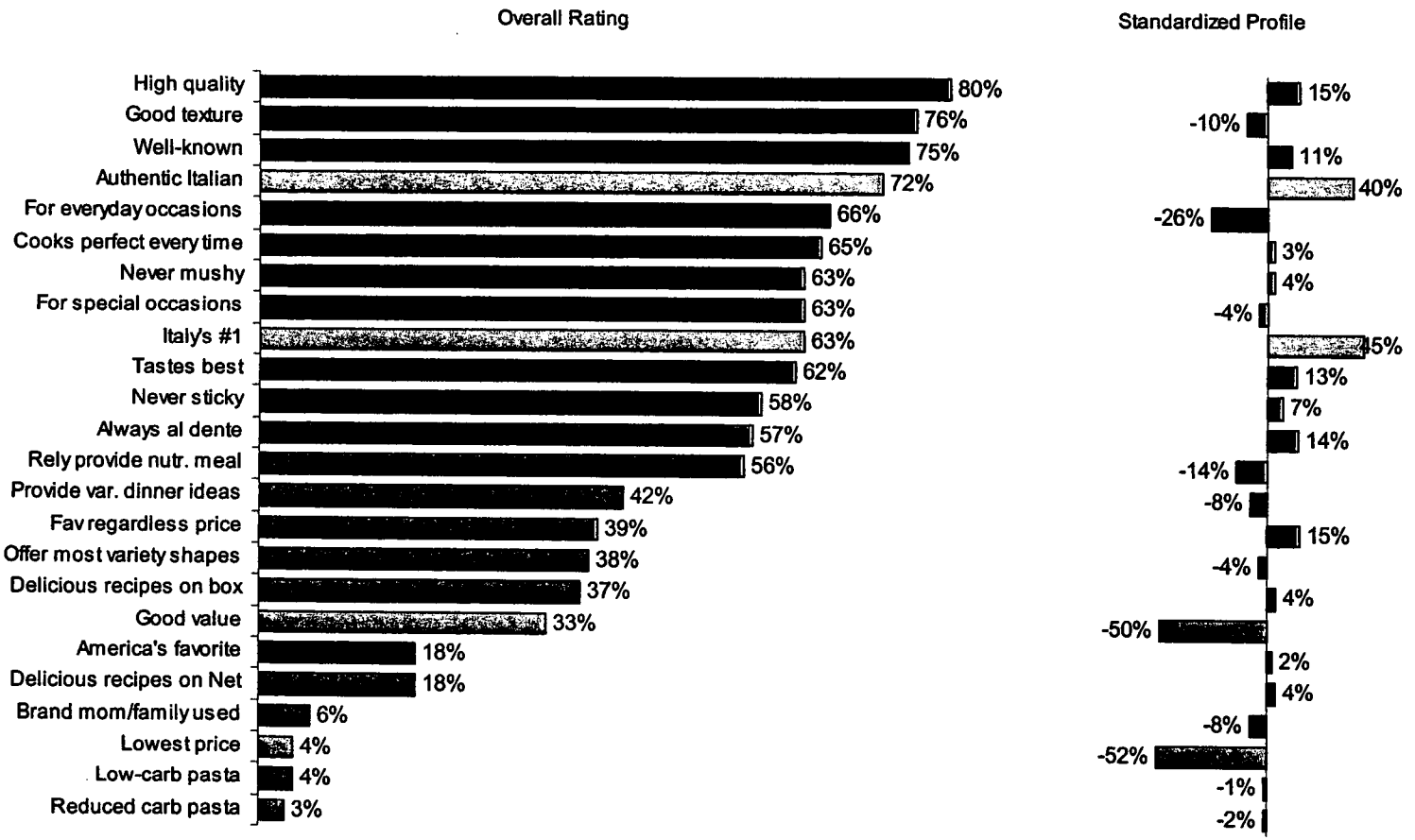


Image Profile – Barilla



Strategic Matrix – Barilla

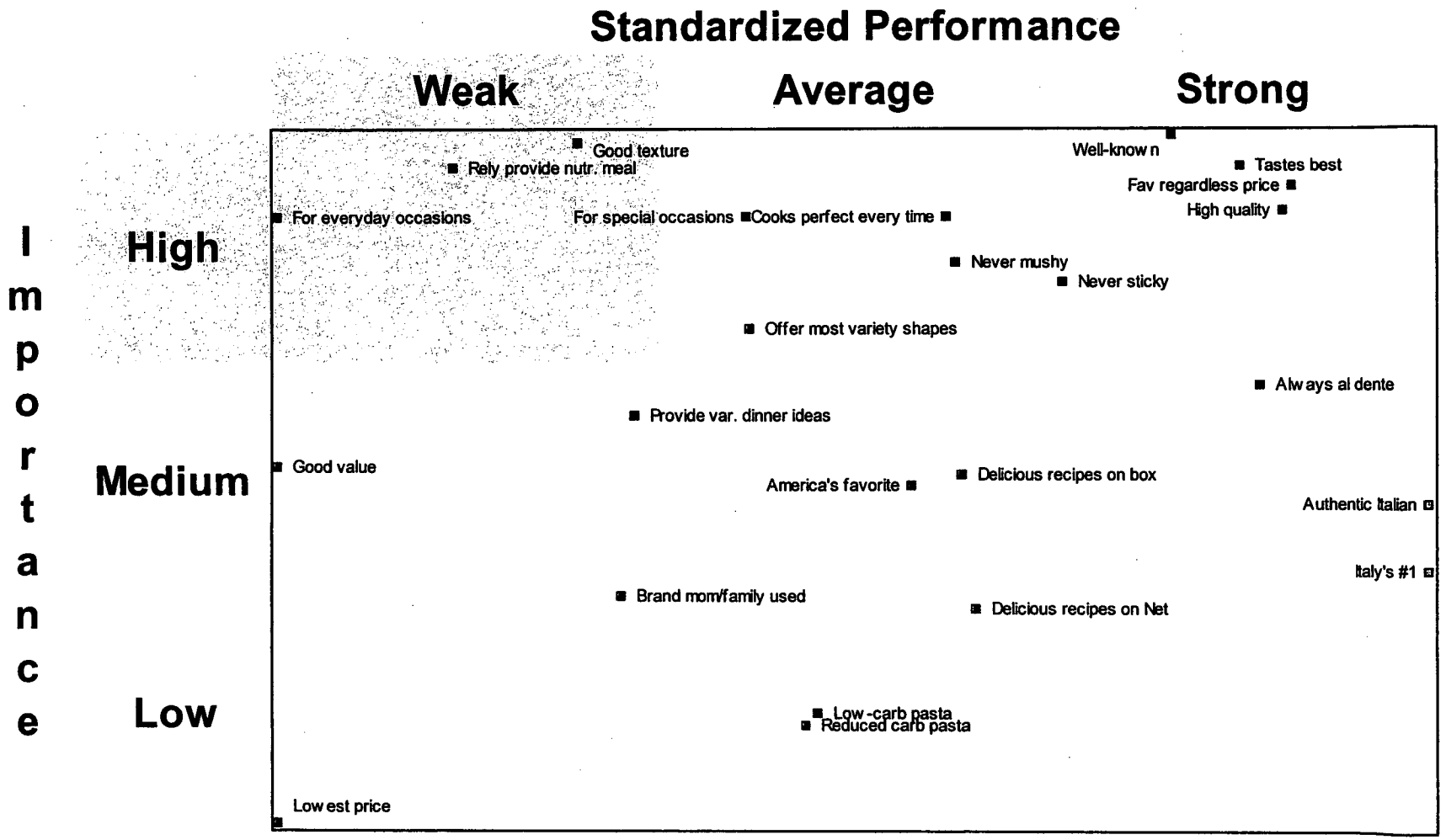
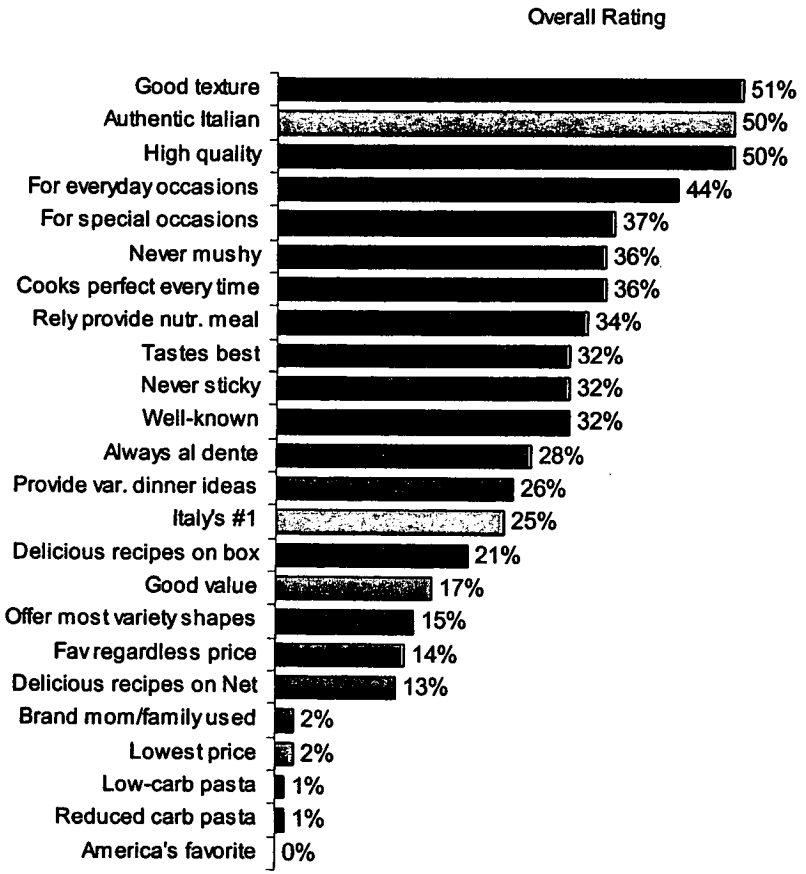
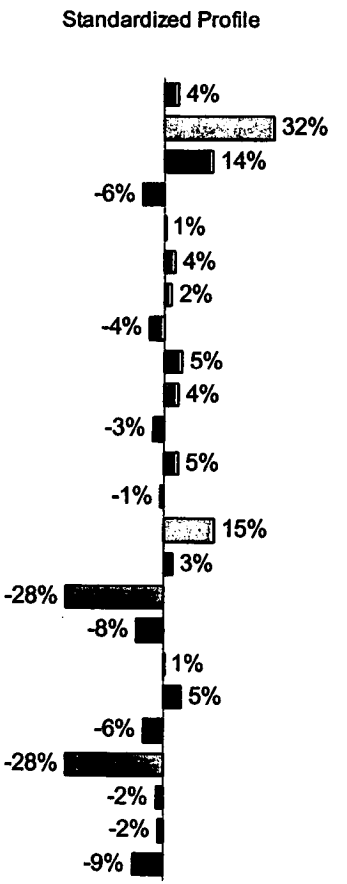
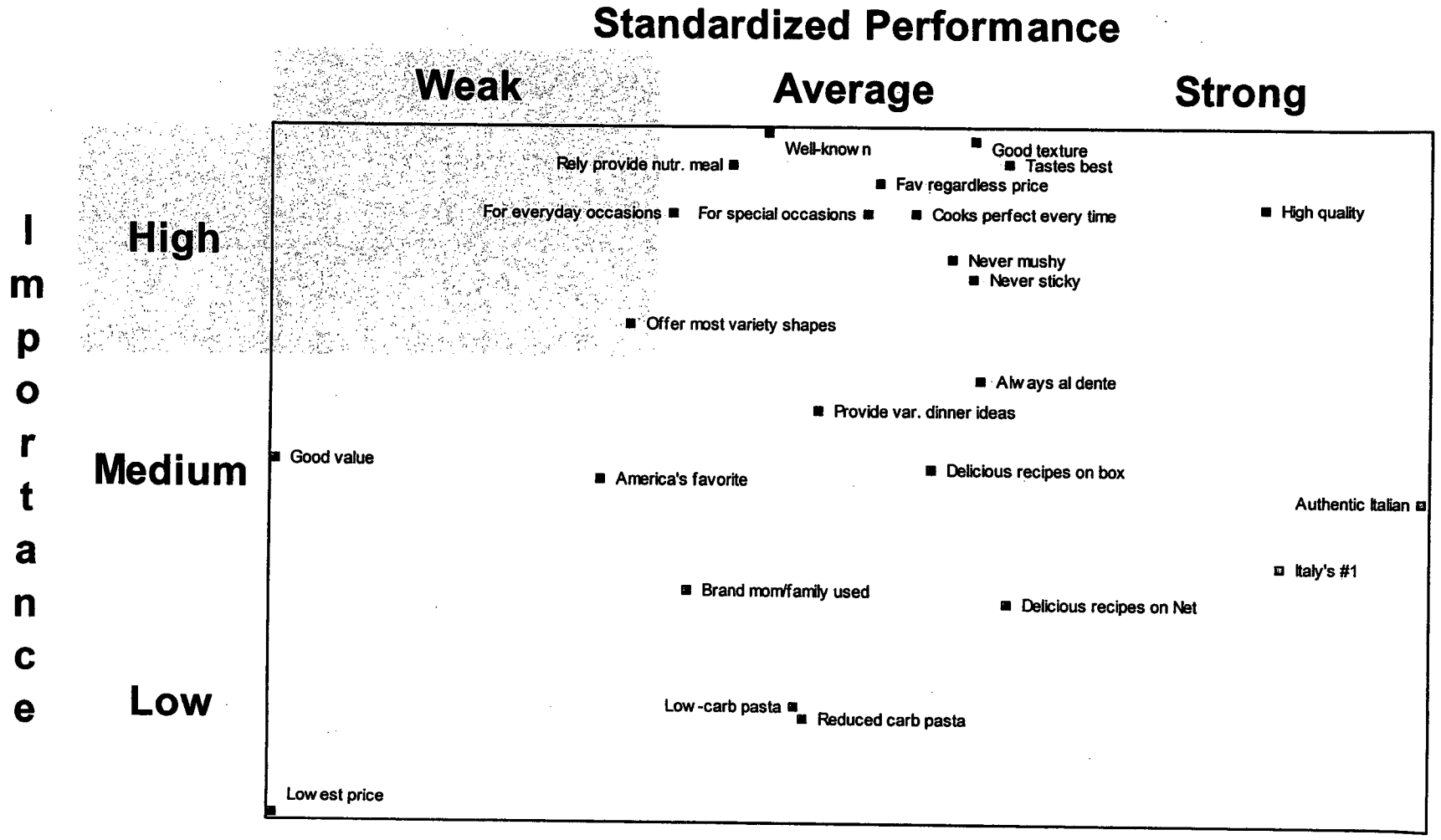


Image Profile – Da Vinci





Strategic Matrix – Da Vinci



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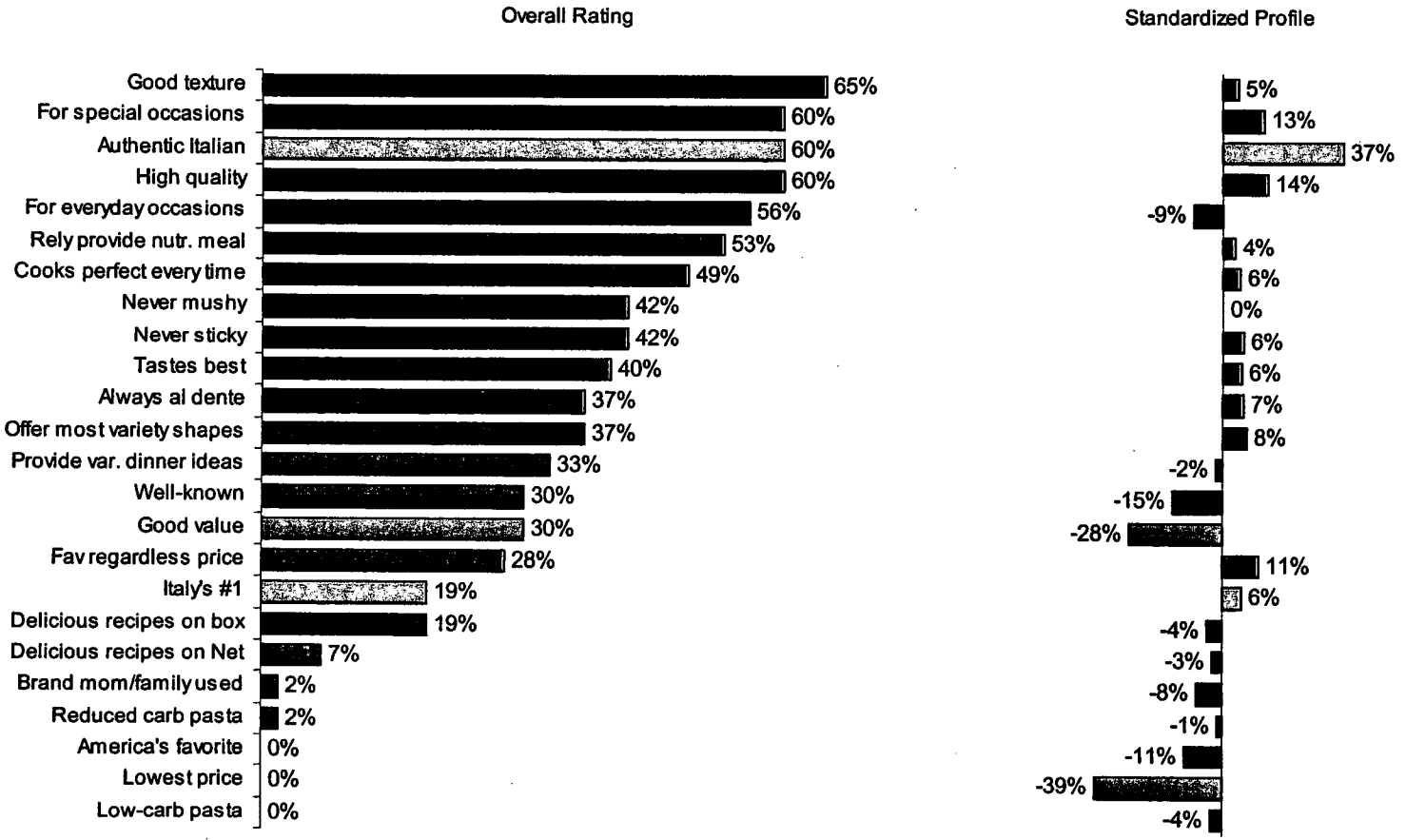

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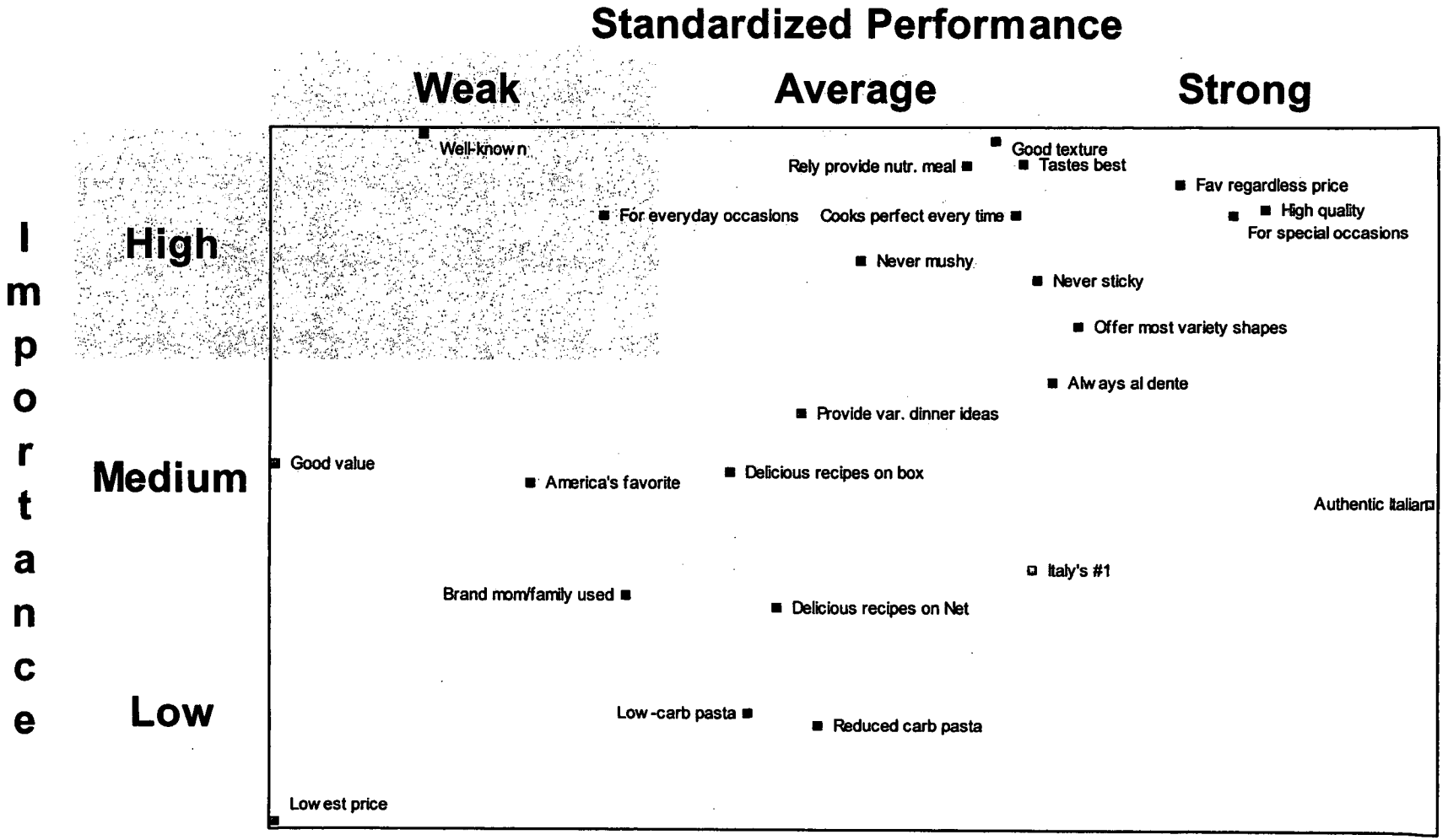

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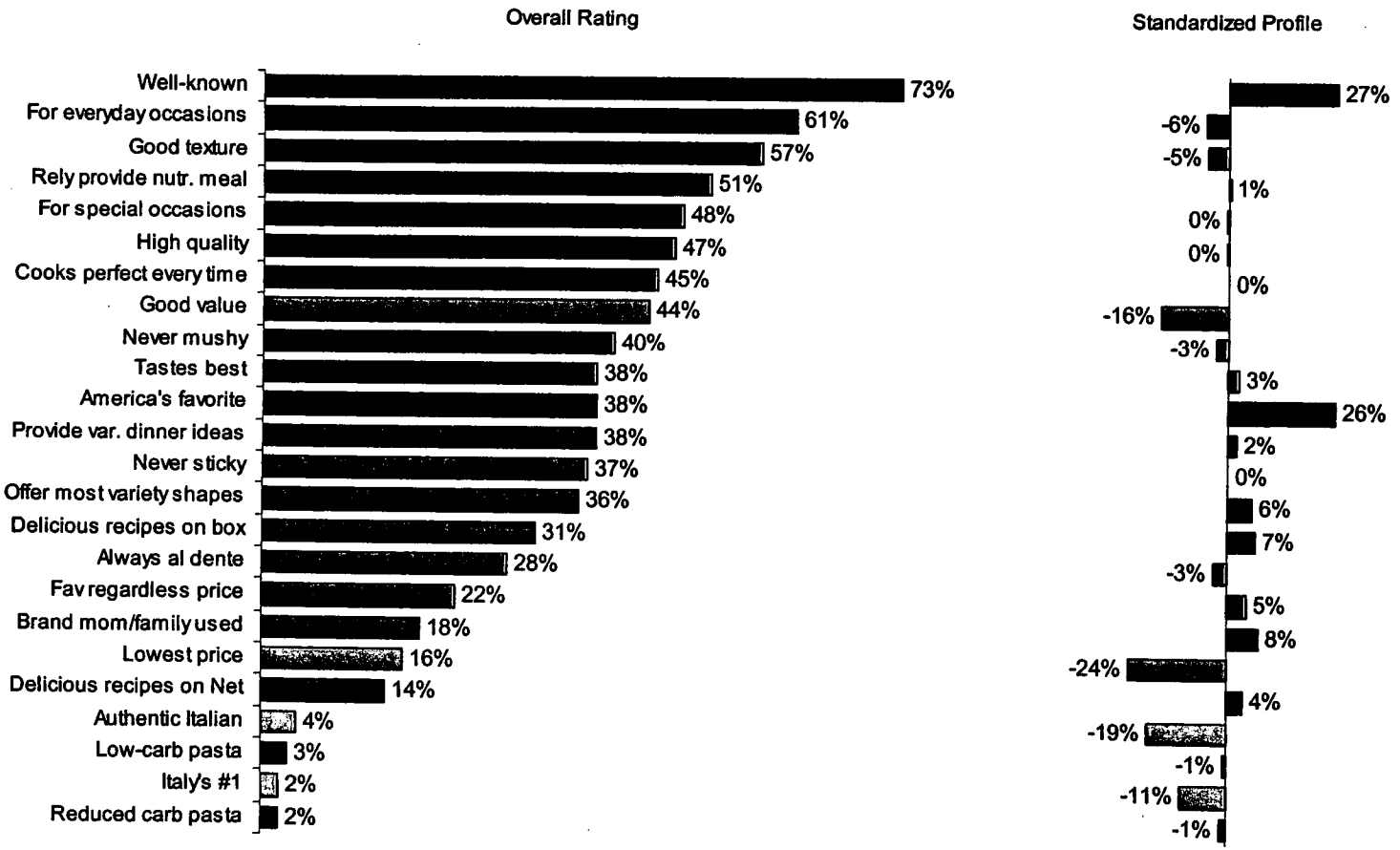

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Attorney's Eyes Only

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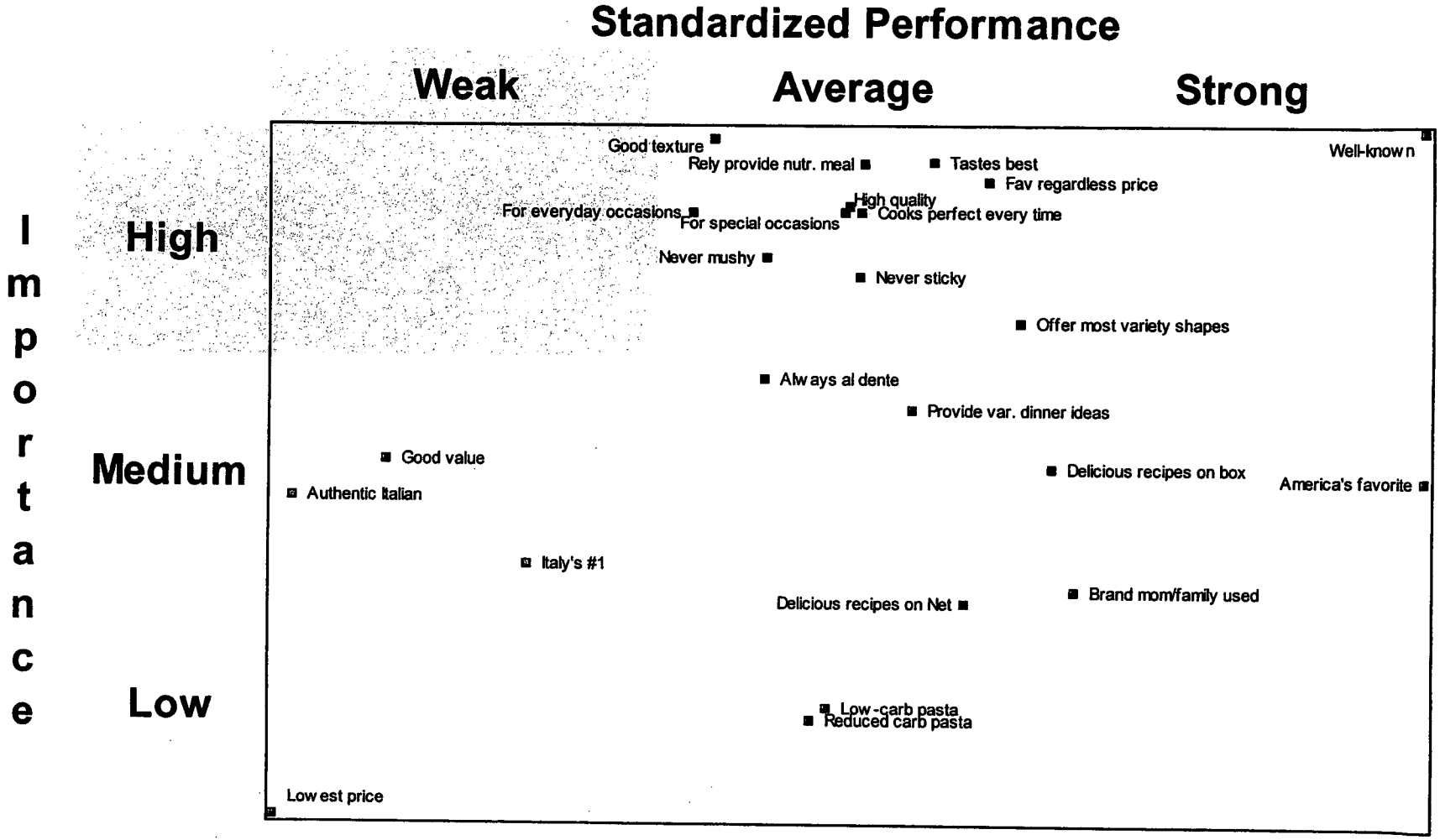
Strategic Matrix – American Beauty



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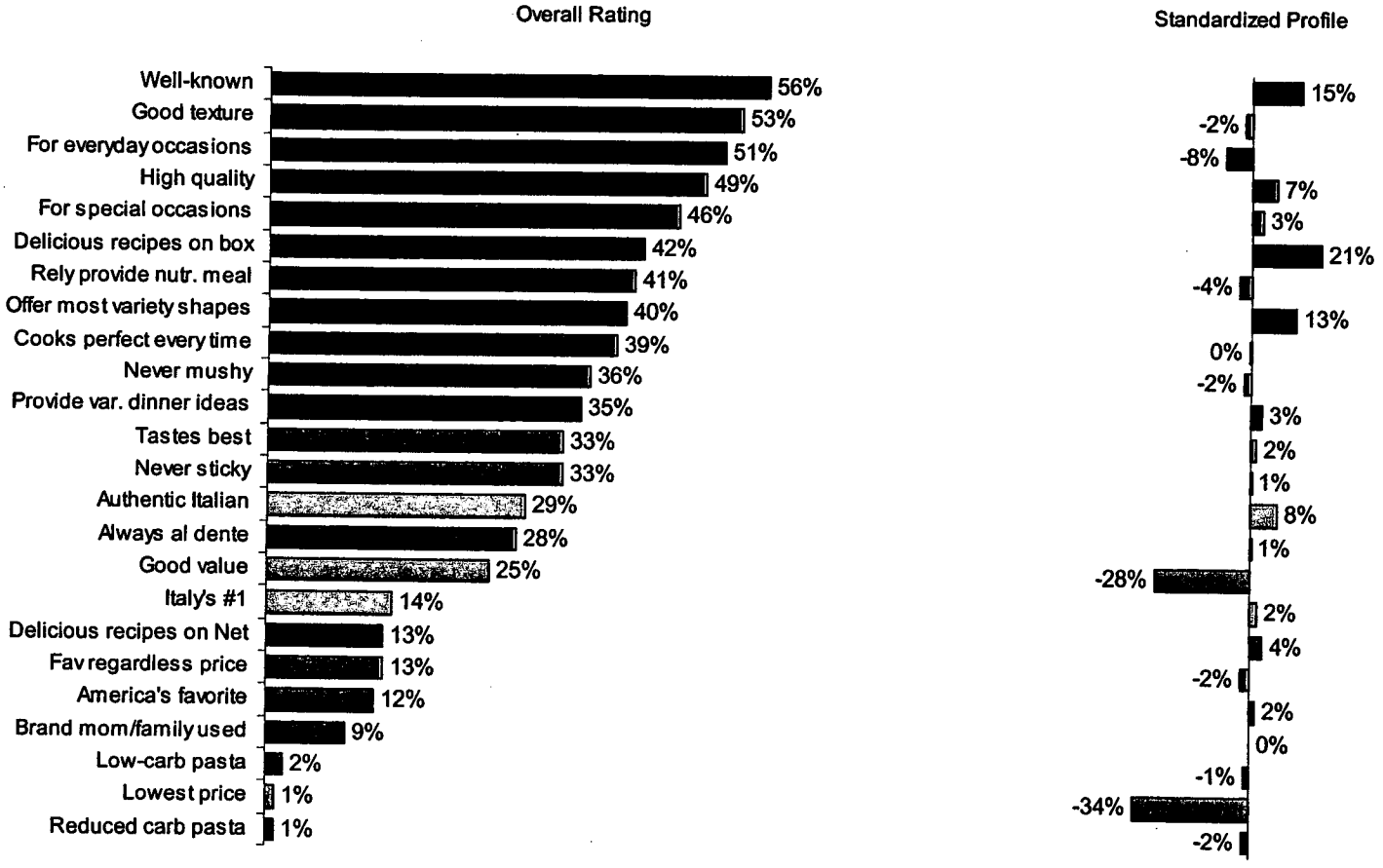

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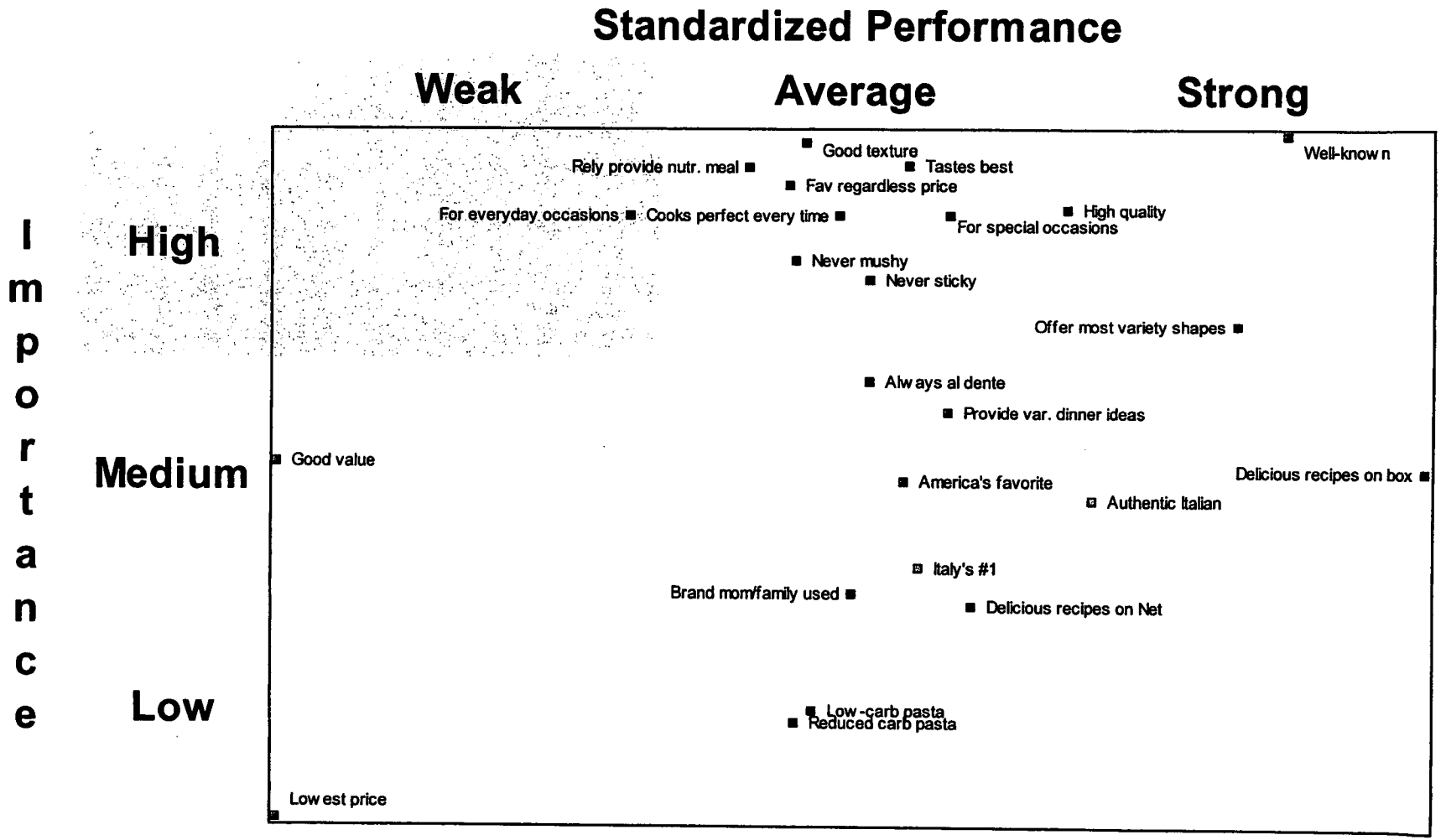

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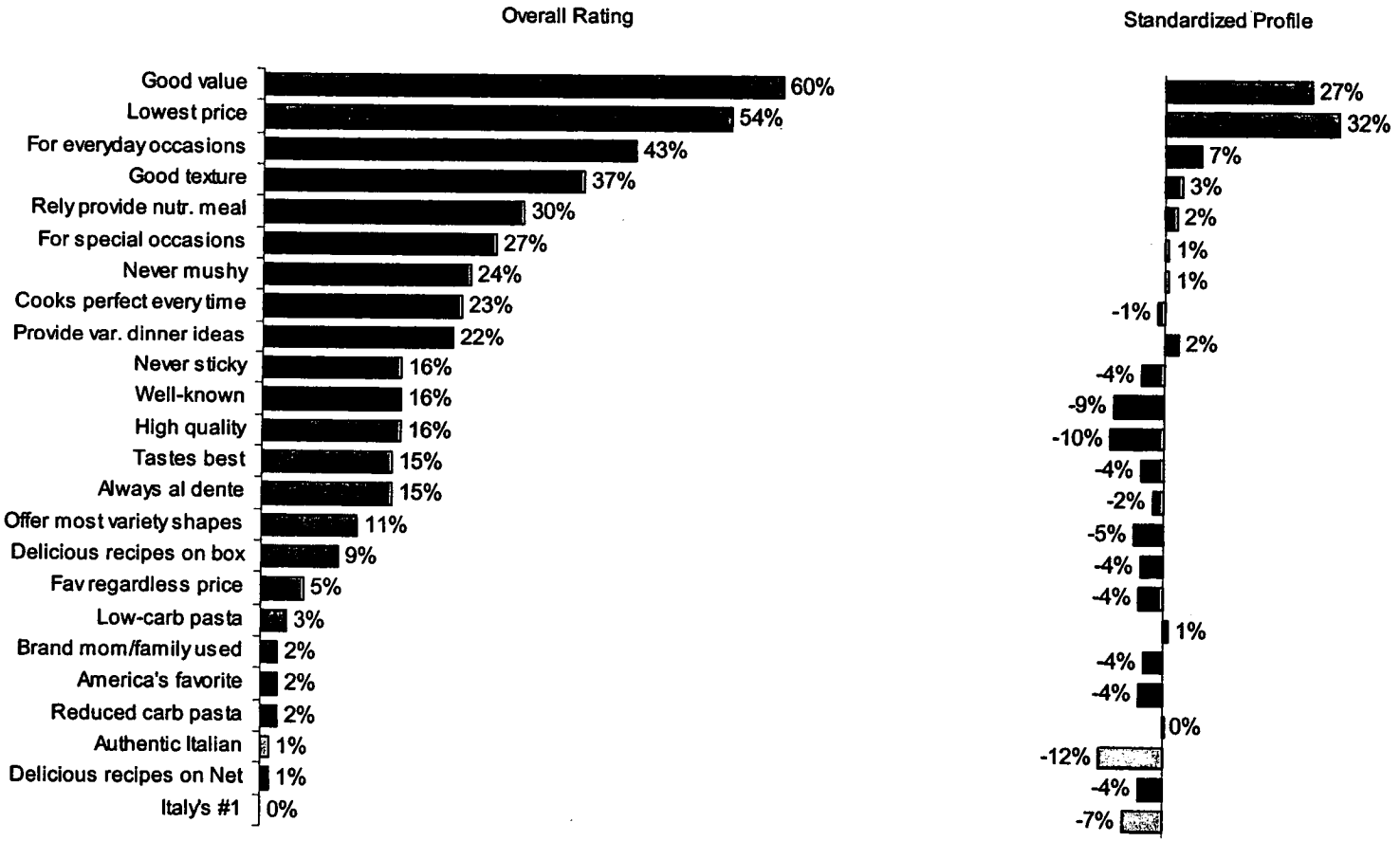

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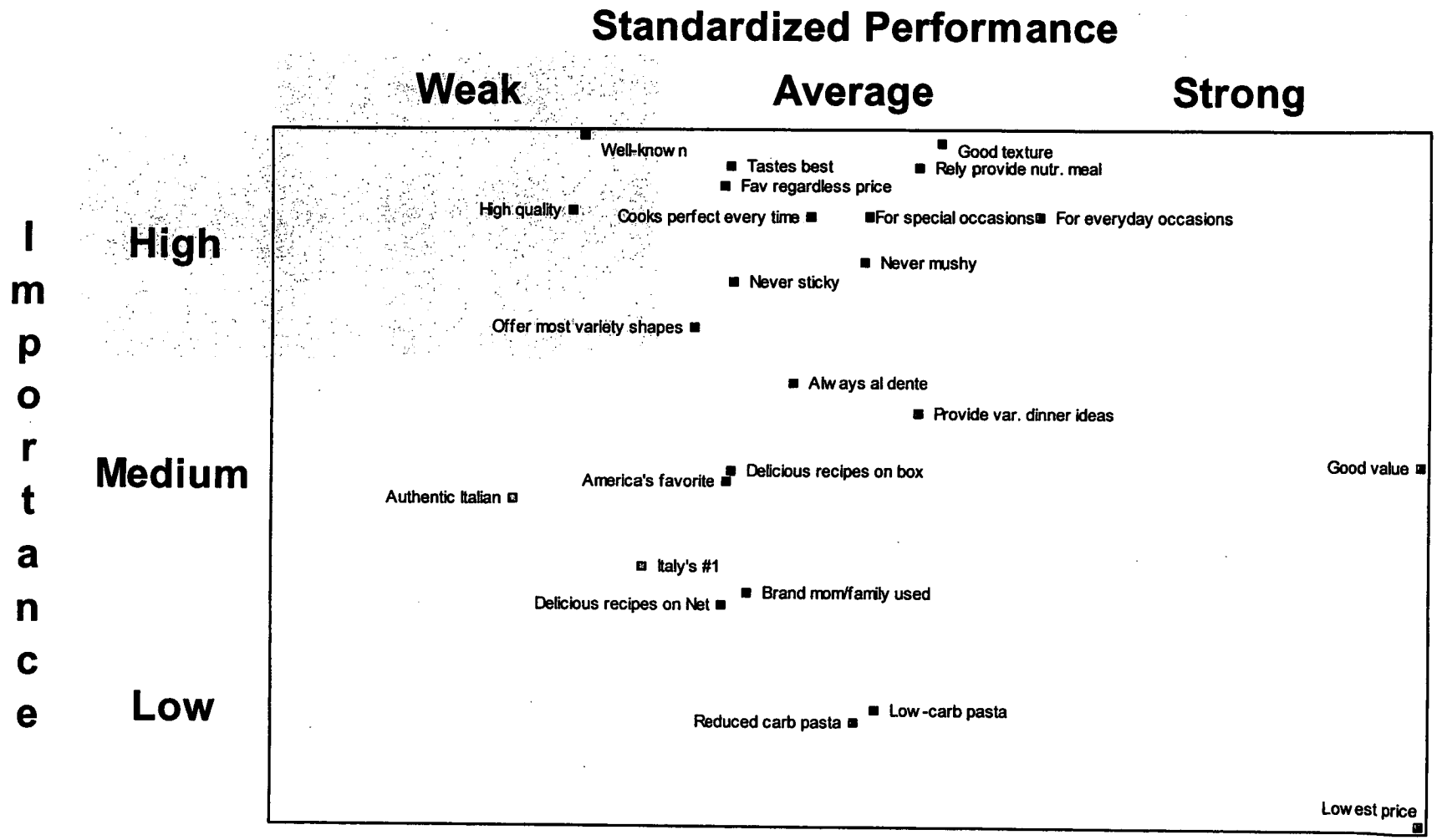

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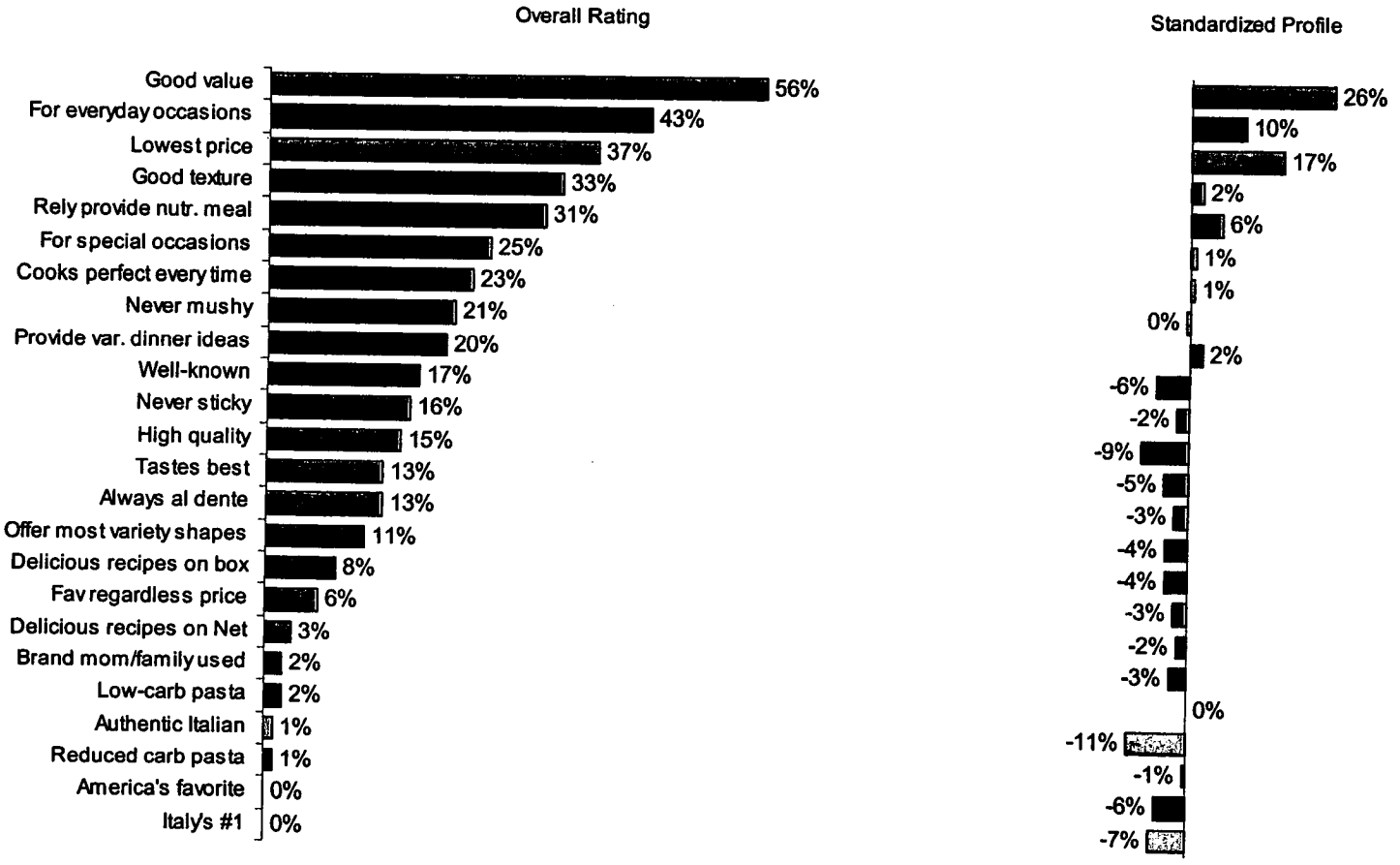

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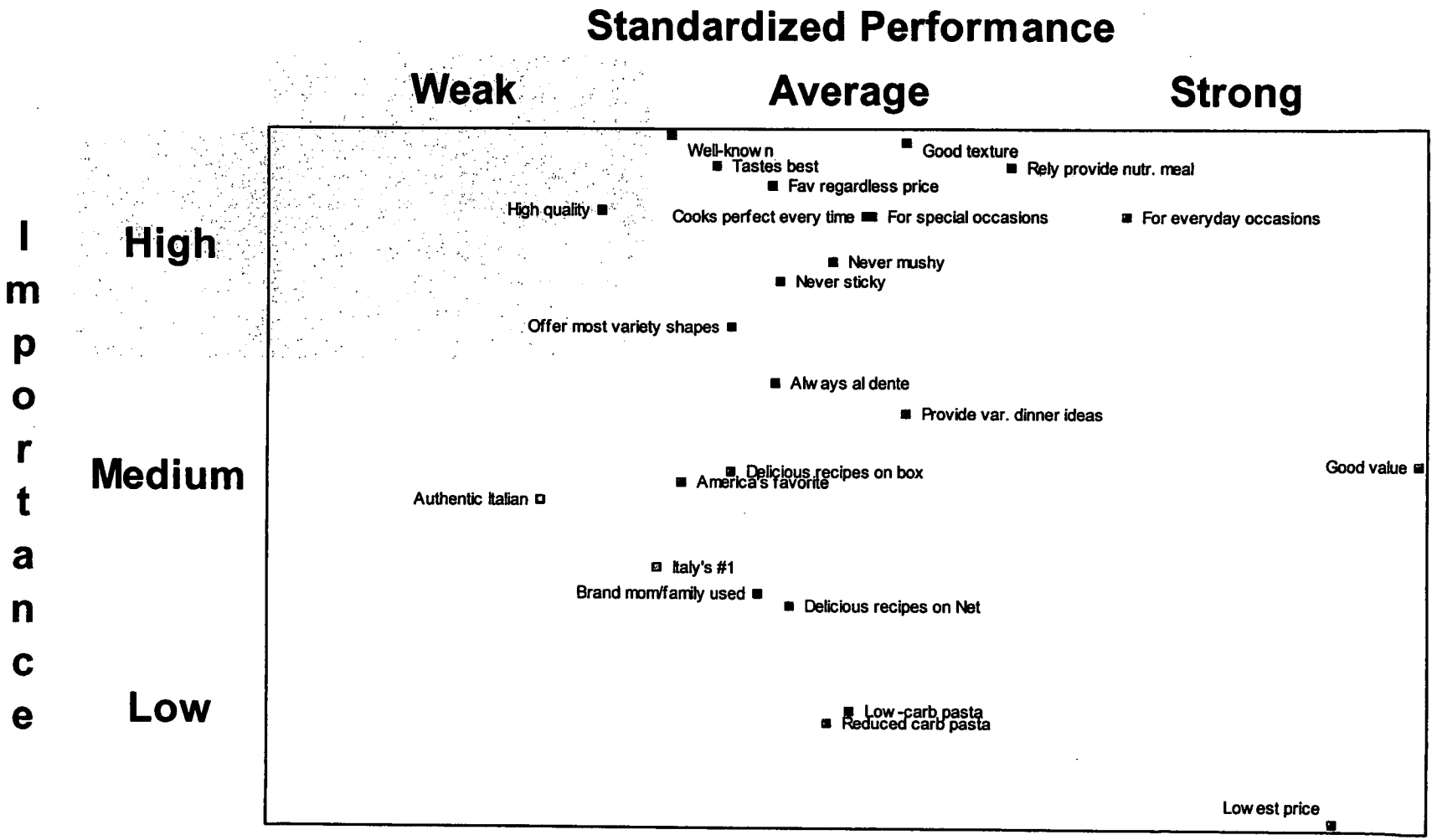

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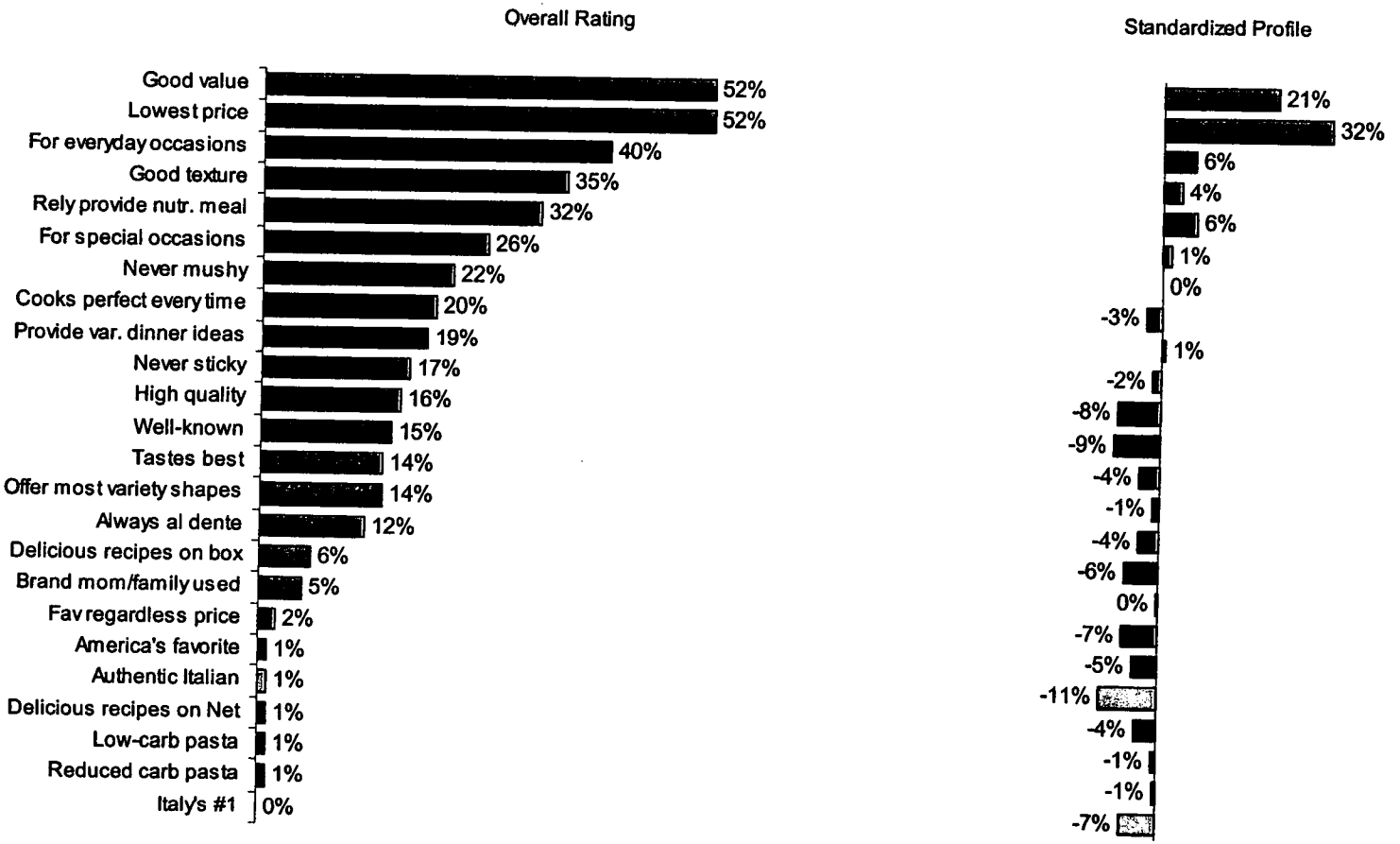

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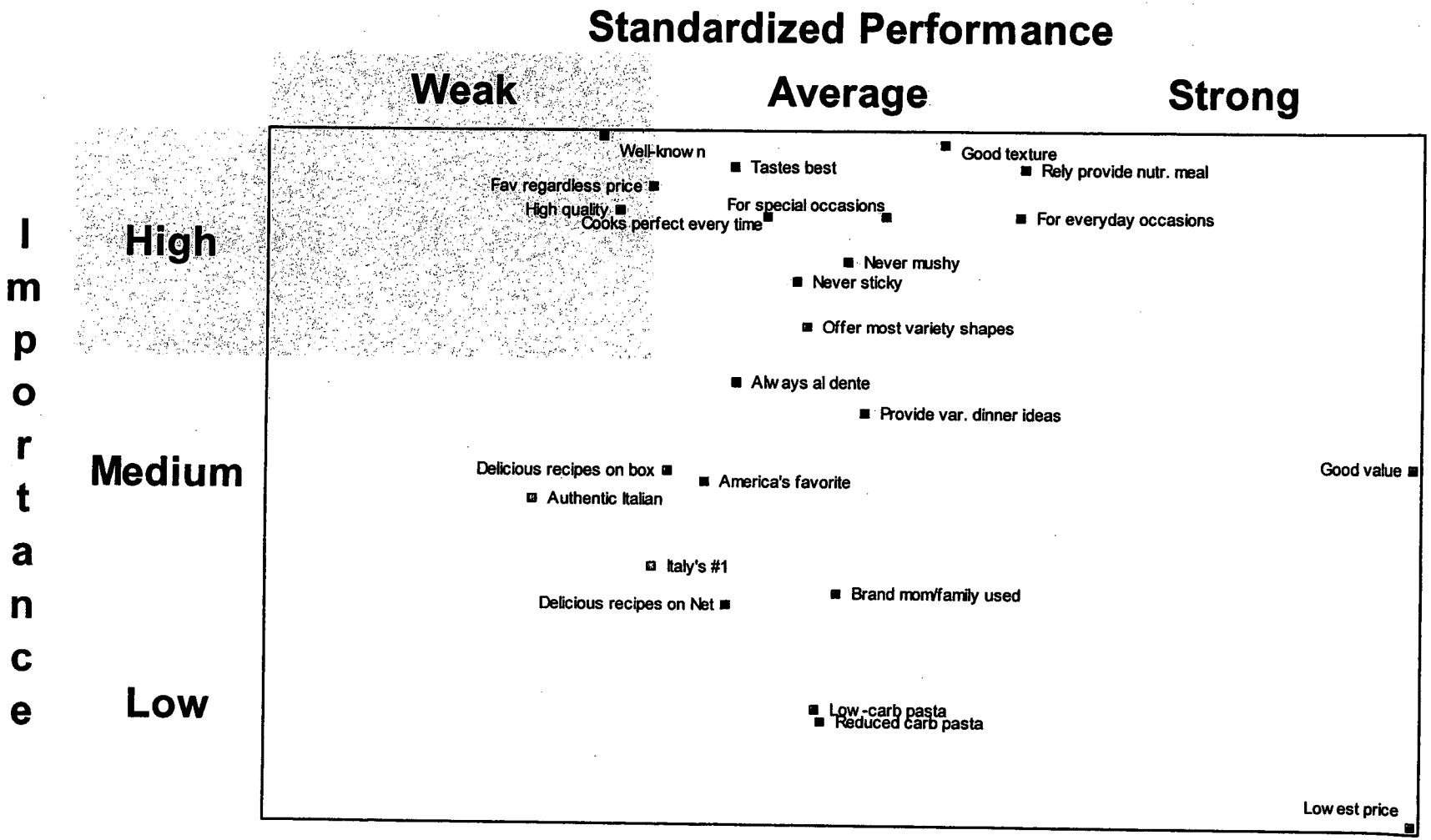

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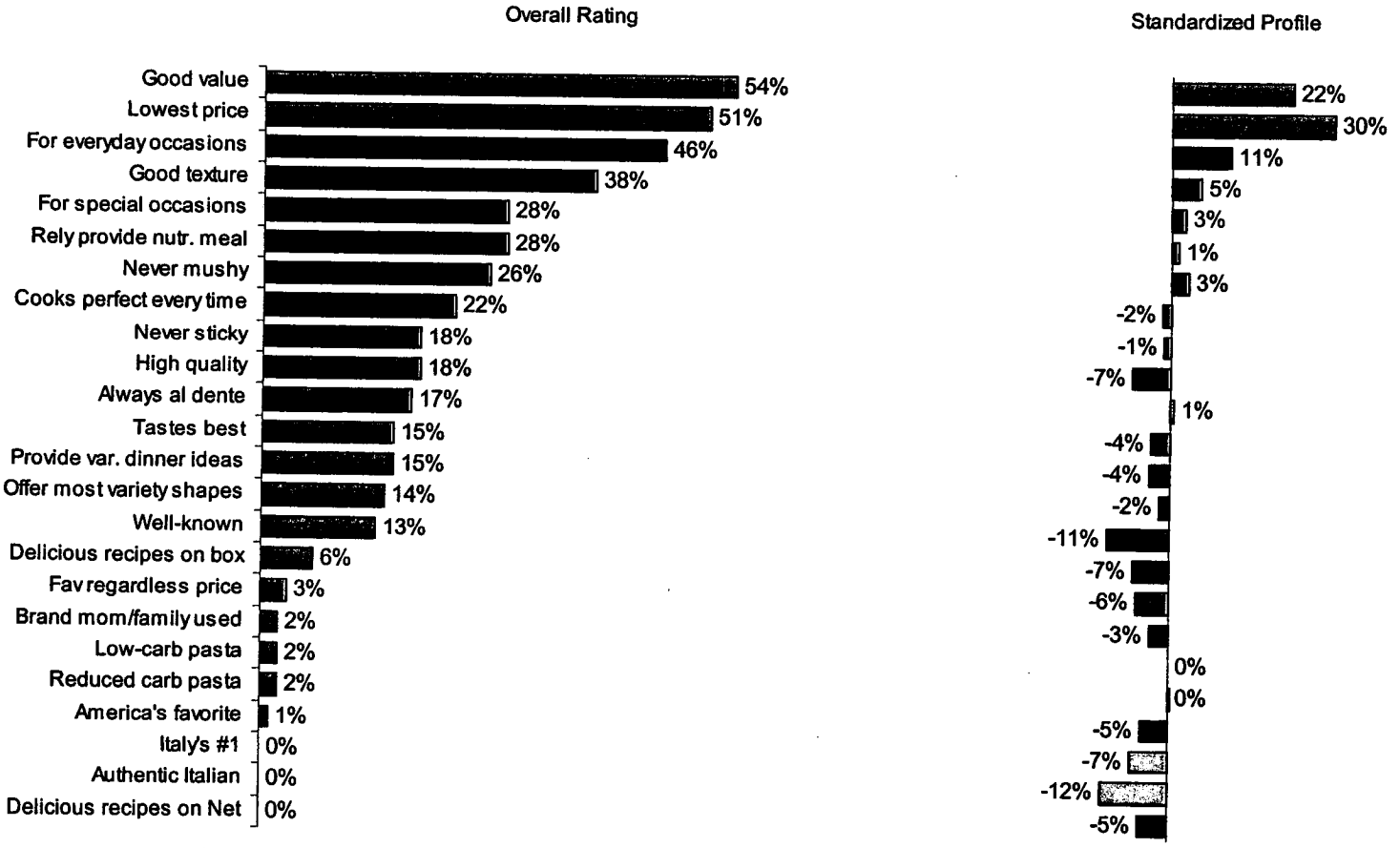

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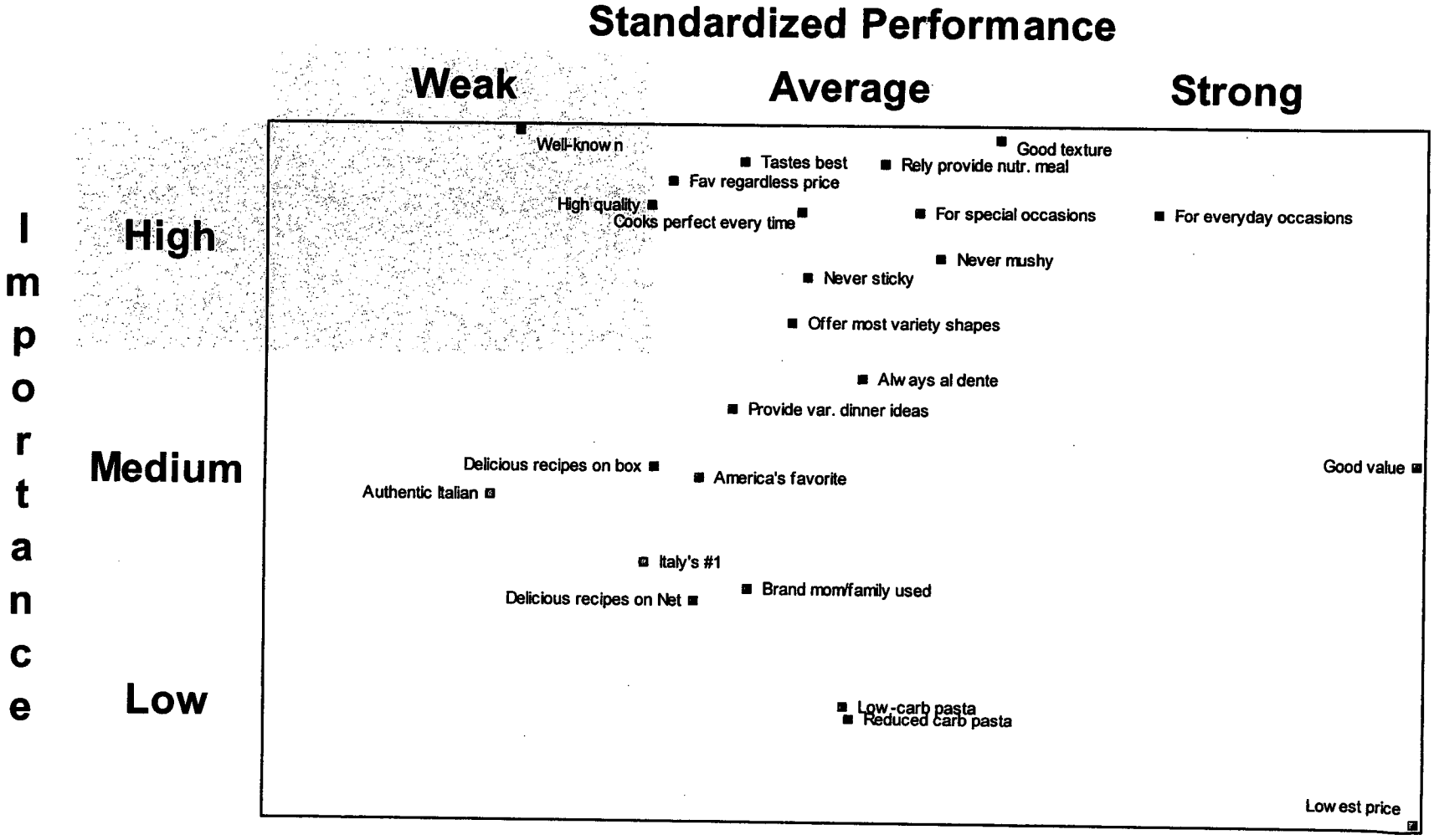

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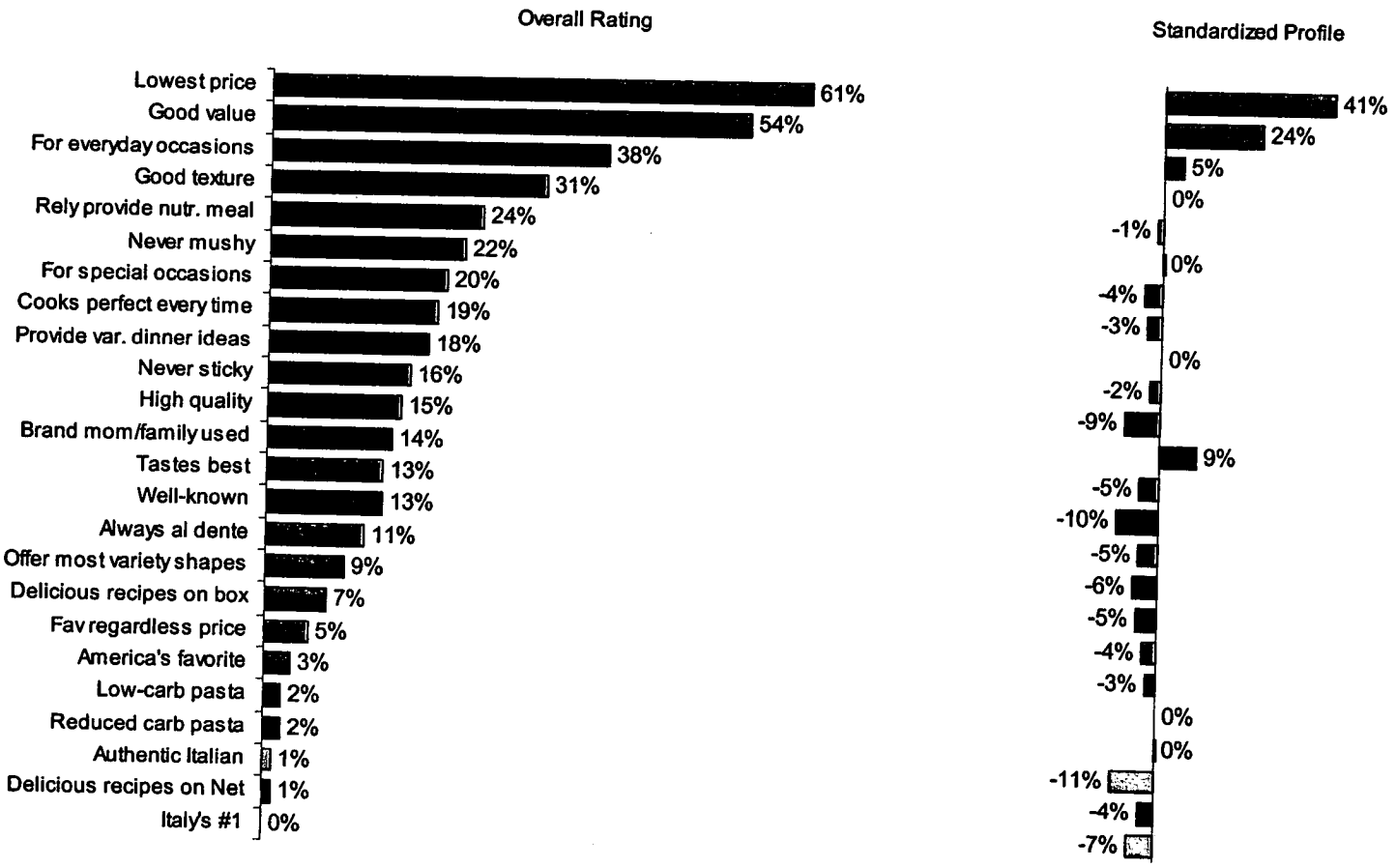

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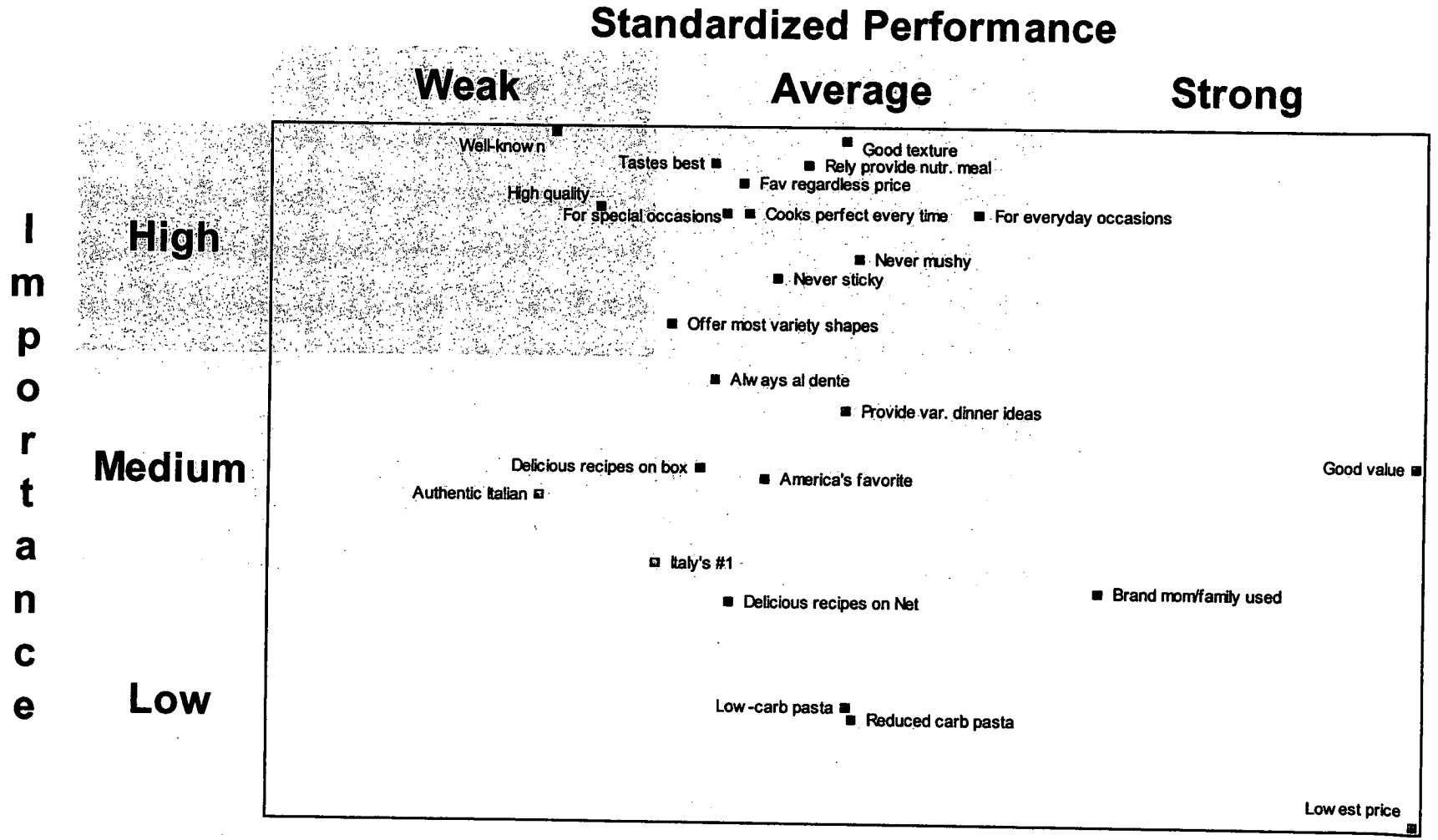

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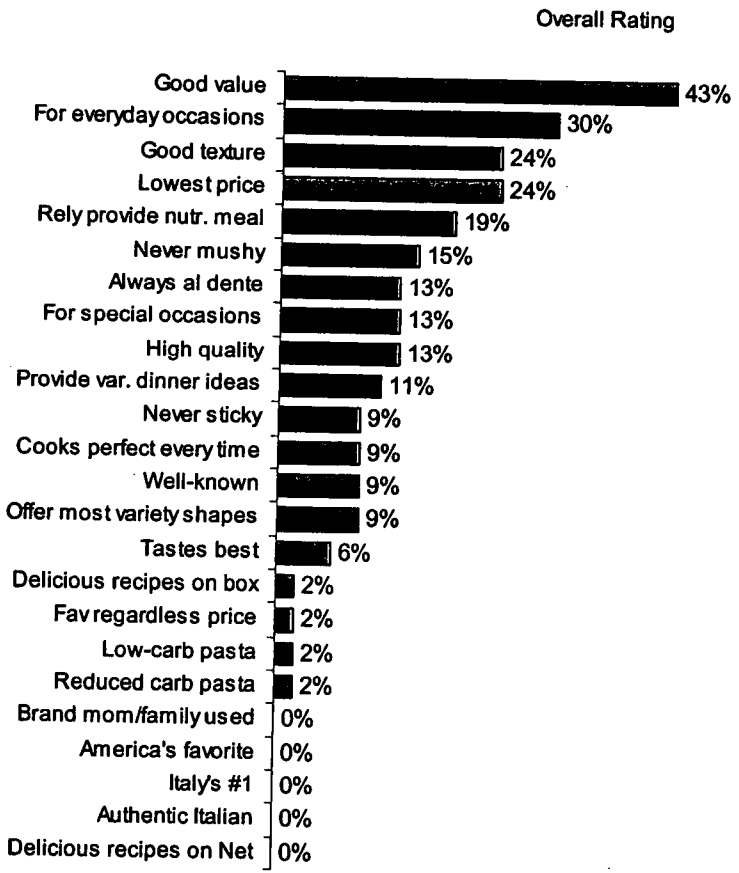

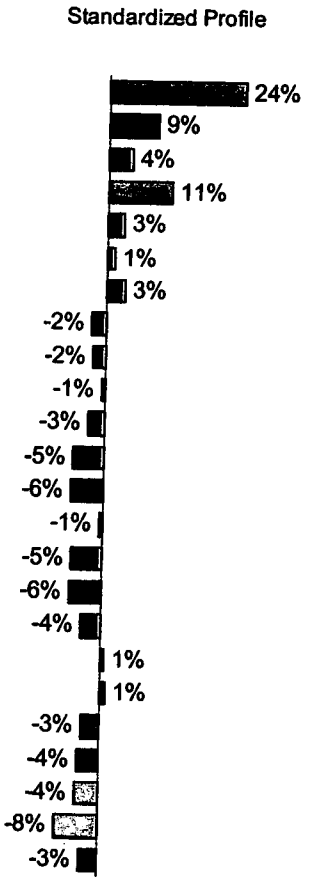

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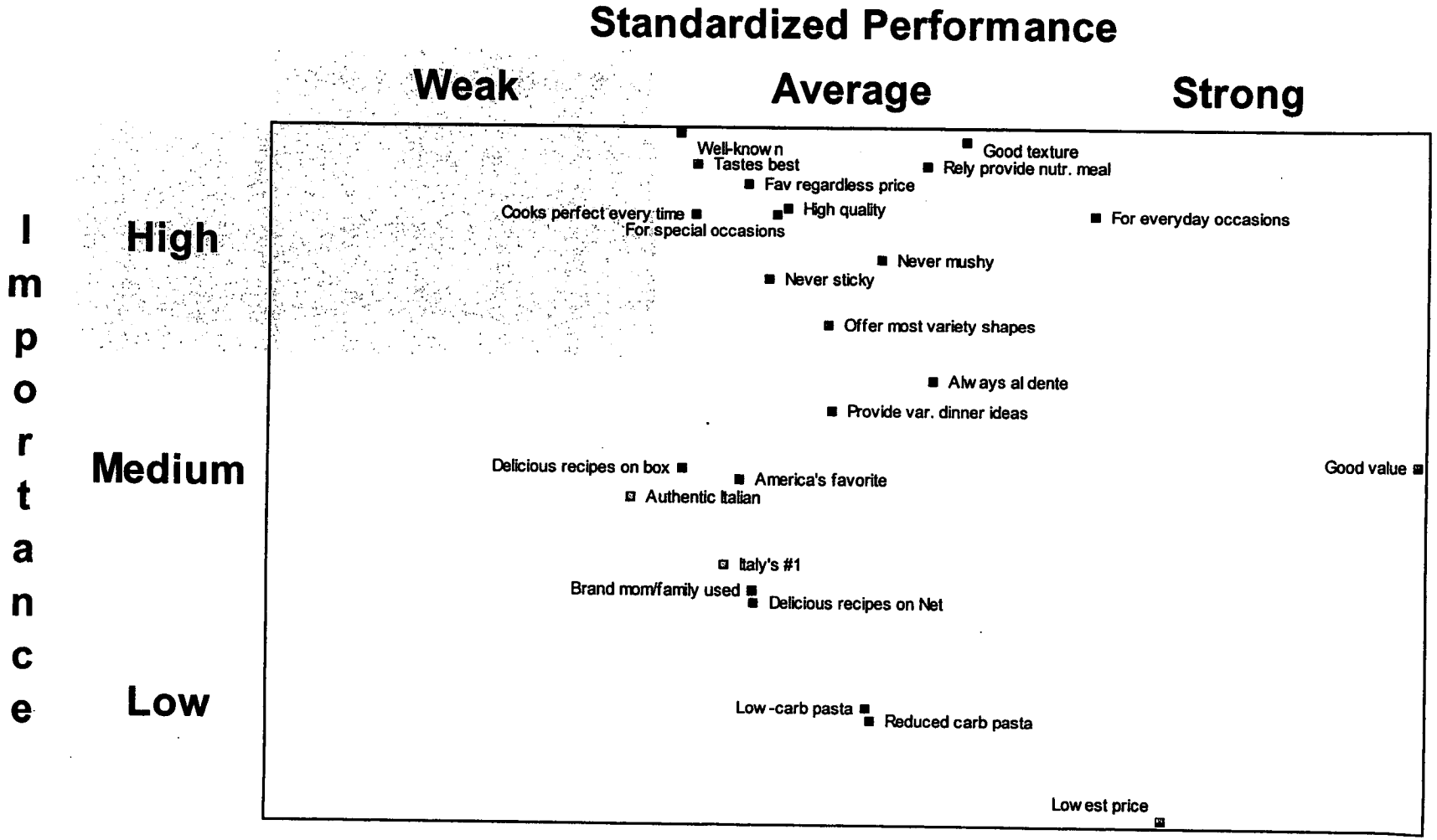

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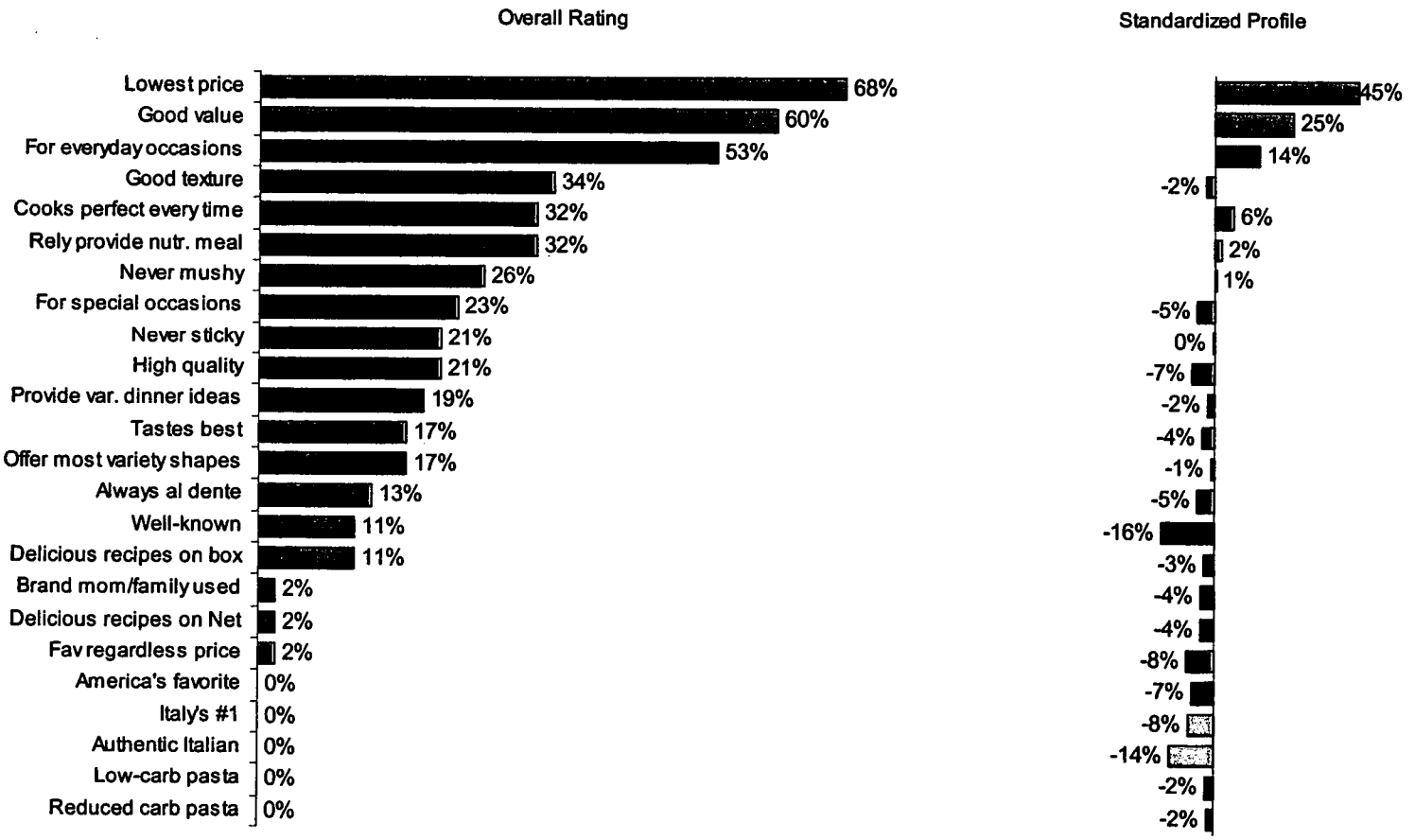
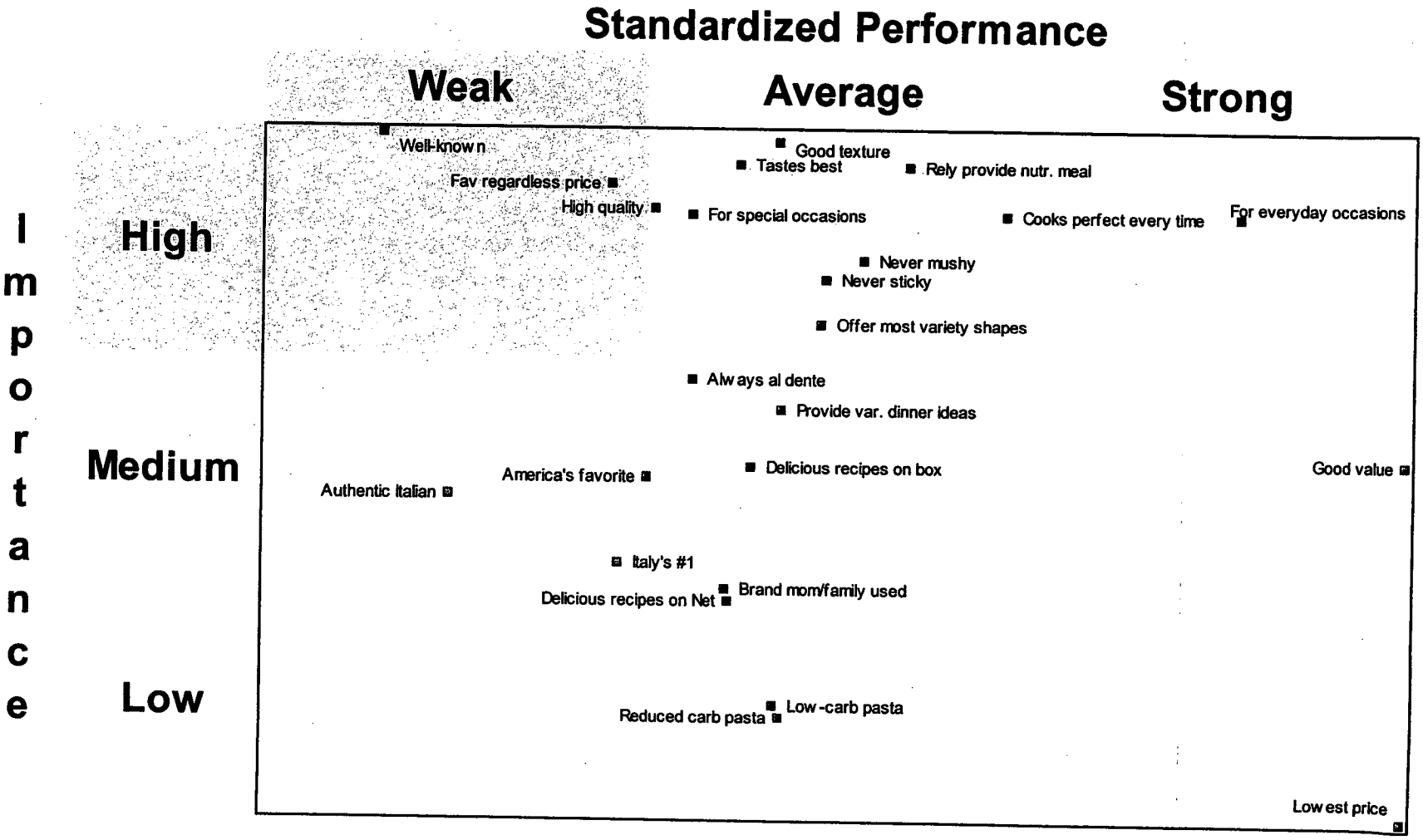


Strategic Matrix – Flavorite



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Mueller's®
TWISTS

A CHOLESTEROL FREE, SODIUM FREE FOOD

AMERICA'S FAVORITE PASTA
MADE FROM 100% SEMOLINA

Mueller's®
ENRICHED MACARONI PRODUCT

TWISTS

Nutrition Facts

Serving Size 2 oz dry (56g/about 3/4 cup)
Servings Per Package 8

Amount Per Serving	
Calories 210	Calories from Fat 10
	% Daily Value*
Total Fat 1g	**2%**
Saturated Fat 0g	**0%**
Polyunsaturated Fat 0.5g	
Monounsaturated Fat 0g	
Cholesterol 0mg	**0%**
Sodium 0mg	**0%**
Total Carbohydrate 42g	**14%**
Dietary Fiber 1g	**4%**
Sugars 2g	
Protein 7g	**6%**

Vitamin A 0%	•	Vitamin C 0%	
Calcium 0%	•	Iron 10%	
Thiamin 35%	•	Riboflavin 15%	
Niacin 15%	•	Folic Acid 30%	

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
Protein		50g	65g

INGREDIENTS: DURUM WHEAT SEMOLINA, ENRICHED WITH B VITAMINS (NIACIN, THIAMIN MONONITRATE, RIBOFLAVIN, FOLIC ACID) AND IRON (FERROUS SULFATE).

NET WT 16 OZ (1 LB) 454g

Distributed By:
Best Foods Division
CPC International Inc.
Englewood Cliffs, NJ
07632-9976

Mueller's®
TWISTS

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EXHIBIT
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Mueller's®

For over 130 years, pasta lovers have enjoyed the great taste of Mueller's®. Mueller's® cooks to perfect tenderness every time because it's made from 100% pure semolina milled from the highest quality durum wheat. Taste why Mueller's® is America's favorite pasta!

Low Fat

CAESAR PASTA SALAD

- **1/2 cup Hellmann's® low fat mayonnaise dressing or light or real mayonnaise**
- **1/4 cup grated Parmesan cheese**
- **1/4 cup lowfat milk**
- **2 Tbsp lemon juice**
- **2 cloves garlic, minced**
- **1 medium head romaine lettuce, cut crosswise into 1/2-inch wide strips (8 cups loosely packed)**
- **1 lb boneless, skinless chicken breast, cooked and thinly sliced**
- **8 oz MUELLER'S twists (about 3 cups), cooked, rinsed with cold water and drained**
- **Freshly ground pepper**

1. In large bowl combine first 5 ingredients.

2. Add lettuce, chicken and twists; toss to coat. Season to taste with freshly ground pepper.

MAKES ABOUT 10 (1 cup) MAIN DISH SERVINGS **PREP TIME: 15 MINUTES**

Nutrition Information Per Serving: *190 Calories, 30 Calories From Fat, 3g Total Fat, 1g Saturated Fat, 40mg Cholesterol, 170mg Sodium, 21g Total Carbohydrate, 1g Fiber, 18g Protein.*

TIP: In step 1, substitute 3/4 cup bottled creamy Caesar or Ranch dressing for first 5 ingredients.

Low Fat

PASTA WITH A TWIST

- **1 1/4 cups water**
- **2 chicken bouillon cubes**
- **1 Tbsp Argo® corn starch**
- **2 Tbsp margarine**
- **2 medium carrots, cut into thin strips**
- **1 medium red pepper, cut into thin strips**
- **1 large onion, chopped**
- **1 cup sliced mushrooms (about 4 oz)**
- **1 large clove garlic, minced**
- **2 tsp dried basil**
- **1/8 tsp crushed red pepper (optional)**
- **2 Tbsp lemon juice**
- **8 oz MUELLER'S twists (about 3 cups), cooked and drained**

1. In small bowl stir water, bouillon and corn starch until blended; set aside.

2. In large skillet melt margarine over medium-high heat. Add carrots; stirring occasionally, cook 2 minutes. Add red pepper, onion, mushrooms, garlic, basil and crushed red pepper; cook, stirring, 3 minutes.

3. Stir corn starch mixture and pour into skillet. Stirring constantly, bring to a boil over medium heat and boil 1 minute. Stir in lemon juice. Toss with twists.

MAKES 4 MAIN DISH SERVINGS **PREP TIME: 20 MINUTES**

Nutrition Information Per Serving: *300 Calories, 60 Calories From Fat, 7g Total Fat, 1g Saturated Fat, 0mg Cholesterol, 440mg Sodium, 50g Total Carbohydrate, 4g Fiber, 9g Protein.*

CARTON MADE FROM 100% RECYCLED PAPERBOARD MINIMUM 35% POST-CONSUMER CONTENT

Mueller's®

COOKTIME: 6 TO 8 MINUTES

Servings	Uncooked (Cups)	Water (Quarts)	Cooked (Cups)
2	1 1/2	3	1 3/4
4	3	4	3 1/2
6	4 1/2	4-6	5 1/4
8	1 pkg	6	7

COOKING DIRECTIONS

1. Bring water to a rapid boil. Add salt (1 to 2 tsp), if desired.
2. Add twists, stirring to separate; return to boil.
3. Cook uncovered, stirring occasionally, **6 to 8 minutes** or until desired tenderness.
4. Drain. Serve immediately.

TIPS

- Reduce cook time slightly when using in a recipe that requires further cooking.
- If using in a salad, rinse immediately with cold water; drain.

Quality of BEST FOODS products is guaranteed. We value your comments and questions, please call **1-800-338-8831**.

CPC International®

Product of U.S.A.
MU-00217-CT-04

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Mueller's®
Ready Cut

Mueller's®
Ready Cut

AMERICA'S FAVORITE PASTA

Mueller's®

QUALITY SINCE 1867

APPROXIMATE COOKING TIME
9 to 10 minutes

COOKING GUIDELINES
1 lb. pasta serves 6-8

COOKING INSTRUCTIONS
1. *Boil water (4 quarts per 1 lb. of pasta).*
2. *Add salt to taste (optional).*
3. *Add pasta. Wait for reboil.*
4. *Cook uncovered, stirring occasionally, 9 to 10 minutes or until desired tenderness.*
5. *Remove from heat and drain.*

SERVING SUGGESTION

Mueller's Create-A-Meal

Mueller's inspires endless meal PASTAbilities! Mix n' Match from the chart below.

Start with	Pick a Sauce	Add a Veggie	Add a Meat
8 oz Mueller's Ready Cut, cooked and drained.	1 cup pasta sauce	1 cup cooked mixed vegetables	1 lb browned ground beef
	2 cups Alfredo sauce	6 sliced mushrooms	1-1/2 cup diced ham
	1/2 cup Italian dressing	2 cups cooked broccoli	6 oz can tuna
	1 cup cheese sauce	1 cup sautéed peppers and onions	1 lb sliced, cooked steak
	1-1/2 cup pesto sauce	1-1/2 cup chopped tomatoes	1-1/2 lb sliced, cooked chicken

NET WT 16 OZ (1 lb) 454g

5274

Mueller's®
Ready Cut

92162 4

EXHIBIT
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R0202

Nutrition Facts

Serving Size 2/3 Cup (56g) dry
Servings Per Container 8

Amount Per Serving	
Calories 210	Calories from Fat 10
	% Daily Value*
Total Fat 1g	**2%**
Saturated Fat 0g	**0%**
Cholesterol 0mg	**0%**
Sodium 0mg	**0%**
Total Carbohydrate 41g	**14%**
Dietary Fiber 2g	**7%**
Sugars 2g	
Protein 7g	

Vitamin A 0%	•	Vitamin C 0%	
Calcium 0%	•	Iron 10%	
Thiamine 30%	•	Riboflavin 15%	
Niacin 20%	•	Folate 25%	

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: 100% DURUM SEMOLINA, NIACIN, FERROUS SULFATE (IRON), THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID.
CONTAINS WHEAT INGREDIENTS

Distributed By: American Italian Pasta Co.
Excelsior Springs, MO 64024

100% Satisfaction Guaranteed –
We value your comments and questions, please call (TOLL FREE) 1-877-EAT-PASTA (1-877-328-7278)

Visit our website
www.muellerspasta.com

Product of U.S.A.

CARTON MADE FROM 100% RECYCLED PAPERBOARD MINIMUM 35% POST-CONSUMER CONTENT

Mueller's®

For over 135 years, pasta lovers have enjoyed the great taste of Mueller's. Our pasta cooks to perfect tenderness every time because it's made from 100% pure semolina milled from the highest quality durum wheat. Taste why Mueller's is America's favorite pasta!

CLIP & SAVE!

- 1 lb lean ground beef
- 1 small onion, chopped
- 1 jar (26 to 30 oz) pasta sauce
- 1/2 tsp salt
- 1/8 tsp pepper
- 16 oz MUELLER'S Ready Cut, cooked 8 minutes & drained
- 1/2 cup (2 oz) shredded Cheddar or American cheese (optional)

In large skillet over medium heat, cook ground beef and onion, stirring frequently, 4 minutes or until meat is browned. Drain. Stir in pasta sauce, salt and pepper; heat to simmering. Stir in Ready Cut. Sprinkle with cheese (optional). Cover and heat 1 minute or until cheese melts.

MAKES 6 TO 8 SERVINGS PREP TIME: 15 MINUTES

Southwest Beef and Pasta Supper: Add 1 pkg (10 oz) frozen corn and 1 Tbsp chili powder with pasta sauce. Add 1 can drained black beans (15 oz) and 1 bunch of chopped cilantro.

CLIP & SAVE!

- 1 1/2 cups milk
- 2 Tbsp corn starch
- 1 tsp salt
- 1/2 tsp dry mustard
- 1/4 tsp pepper
- 2 Tbsp margarine or butter
- 2 cups (8 oz) shredded Cheddar cheese, divided
- 8 oz (1/2 pkg) MUELLER'S Ready Cut, cooked and drained
- 1 cup salsa

In 3-quart sauce pan combine milk, corn starch, salt, mustard and pepper. Add margarine. Stirring constantly, bring to a boil over medium heat; boil 1 minute. Remove from heat. Reserve 1/4 cup cheese for topping. Stir remaining cheese into sauce until smooth; stir in Ready Cut and salsa. Turn into 2-quart casserole; sprinkle with reserved cheese. Bake in 375° oven for 25 minutes or until hot and bubbly. **MAKES 4 SERVINGS** PREP TIME: 12 MINUTES

AMERICA'S FAVORITE PASTA

Mueller's®

QUALITY SINCE 1867

NET WT 16 OZ (1 LB) 454g

EXHIBIT

E

Mueller's®

For over 135 years, Mueller's pasta has cooked up perfectly every time because it's made from pure semolina milled from the highest quality durum wheat. Rotelle means "small wheels" in Italian. This twisted shape holds sauces and tasty bits of vegetables, meats and cheeses, so it works well in a variety of dishes and is a popular choice for salads.

CLIP & SAVE!

Mueller's Rotelle Salad Supreme

- 8 oz (1/2 pkg) MUELLER'S Rotelle, cooked, rinsed with cold water and drained
- 3/4 cup Italian dressing
- 1 medium zucchini, halved lengthwise and thinly sliced
- 4 oz salami, halved lengthwise and thinly sliced
- 10 cherry tomatoes, quartered
- 1/4 cup grated parmesan cheese
- Lettuce leaves (optional)
- Red onion rings (optional)

In large bowl combine all ingredients; toss to coat. Spoon onto lettuce lined platter. If desired, garnish with red onion rings.

MAKES 6 SERVINGS PREP TIME: 15 MINUTES

CLIP & SAVE!

Mueller's Chicken Rotelle Primavera

- 1 Tbsp vegetable or olive oil
- 3/4 lb boneless skinless chicken, cut into thin strips
- 1 small red pepper, coarsely chopped
- 2 cloves garlic, minced or 2 tsp garlic powder
- 1/4 tsp pepper
- 1-1/2 cups water
- 1 Tbsp cornstarch
- 1/4 tsp dried thyme
- 3 cups frozen broccoli florets
- 2 chicken bouillon cubes
- 8 oz (1/2 pkg) MUELLER'S Rotelle, cooked and drained
- 2 Tbsp grated parmesan cheese

In large skillet heat oil over medium-high heat. Add chicken, red pepper, garlic and pepper. Stirring constantly, cook 4 minutes or until chicken is lightly browned. In small bowl stir water, cornstarch and thyme; pour into skillet. Add broccoli and bouillon cubes. Stirring constantly, bring to a boil over medium heat and boil 1 minute. Reduce heat to low; stirring occasionally, simmer 4 minutes longer. Toss with Rotelle; sprinkle with parmesan cheese.

MAKES 4 SERVINGS PREP TIME: 20 MINUTES

Exhibit 7

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AMERICAN ITALIAN PASTA COMPANY Opposer, v. BARILLA G.E.R. - Fratelli S.P.A. Registrant.	)	Opposition No. 91161373 Mark: BARILLA - AMERICA'S FAVORITE PASTA Application No. 78/136,703 Published: March 23, 2004

DECLARATION OF ANN WILLOUGBHY

I, Ann Willoughby, declare:

1. I made a Report of Ann Willoughby on February 21, 2003 and a copy of that Report with the attachments is appended to this Declaration as Exhibit A. I hereby adopt Exhibit A as a part of this declaration submitted in the above-captioned proceedings. My background and experience are substantially detailed in paragraphs 1 through 7 of that report, updated as set forth in the Biography attached as Exhibit B, and I remain the President and CEO of Willoughby Design Group.

2. I have been asked by American Italian Pasta Company to provide this Declaration in support of its Opposition to Barilla's Motion for Summary Judgment in order to introduce Exhibit A and to provide further amplification of the statements made therein.

3. In addition to the work mentioned in my report, I have also reviewed a sample of a recently revised Mueller's pasta box, of which a photo is appended as Exhibit B. In adopting my prior Report appended as Exhibit A, I want to further address in

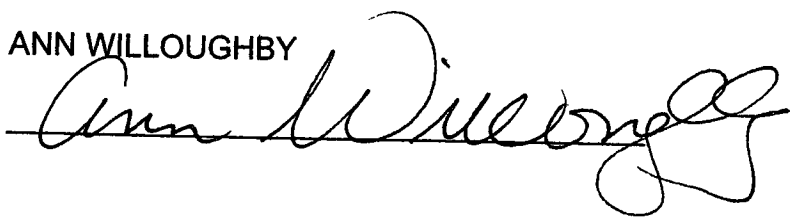
particular two of the conclusions and observations in paragraph 22 of my report.

4. First, It remains my opinion that "AIPC's use of the term "America's Favorite Pasta" on Mueller's packaging is puffery and has no impact on the purchasing decision of the consumer other than brand recognition." This said, I believe that consumers of food products in general and pasta in particular can regard a term or phrase as puffery and still associate and identify that term or phrase as a branding statement, either alone or in connection with a mark. For example, a well-known phrase in the greeting card field would be "When you care enough to send the very best." That statement is in large part puffery, suggesting to the consumer that one greeting card (in this case, Hallmark), has the "very best" cards. Nonetheless, while the consumer may give little weight to the factuality of the phrase, recognizing it as mere puffery, the consumer also draws a connection between that phrase and Hallmark, and regards it as proprietary. Midwest air – the best care in the air, UMB, America's Strongest Banks, BMW – the ultimate driving machine. Other examples of phrases which may be puffery but serve a branding function include the use of "The Best Care in the Air" by Midwest Airlines, "America's Strongest Banks" by UMB, and "The Ultimate Driving Machine" by BMW, as well as others mentioned in paragraph 20 of my report. It is my opinion that the presentation of the phrase "America's Favorite Pasta" on the Mueller's packaging (which is again evolving since my report but still retains the phrase "America's Favorite Pasta" on the front of the package), while not influencing the consumer in regard to a factual determination about the product, does associate it with the Mueller's name and that phrase does, in fact, serve as a brand identifier.

5. In the last bullet point of paragraph 22 of my report attached as Exhibit A, I also reached the conclusion that "(a)ll of these trade dress features, including the phrase 'America's Favorite Pasta,' serve as a trademark function and help consumers recognize the Mueller's brand." This reflects that a number of constituent elements may serve, either individually or collectively, to provide a brand identity. The consumer seeing the Mueller's packaging on the supermarket shelf may draw upon the different elements to identify the brand. I am of the opinion that like the Mueller's name and the red, white and blue packaging, the phrase "America's Favorite Pasta" performs a trademark function for American Italian Pasta Company. The fact that the phrase is puffery does not diminish its connection to the Mueller's brand.

The undersigned, Ann Willoughby, declares that all statements made herein are true; that all statements made herein of his own knowledge are true and that all statements made on information and believe are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the document.

ANN WILLOUGHBY

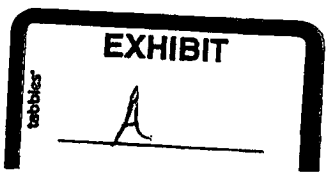


Date: Mar. 6, 2006

American Italian Pasta Company
v.
New World Pasta Company

REPORT OF ANN WILLOUGHBY

February 21, 2003



1. I am a brand designer and the owner and founder of Willoughby Design Group. My firm specializes in brand and communications design for corporate, institutional and retail manufacturers of branded and packaged goods. I have over 30 years experience as a professional designer and brand consultant. I have authored an article entitled "the Design Capital of America," which appeared in Ingram's Magazine November 2002 edition. A copy is attached.

2. I have been retained by Hovey Williams, LLP on behalf of American Italian Pasta Company to review the written submissions to the court, including the complaint, the answer and counterclaim, the motions and responses, and the exhibits thereto, the dried pasta sections of markets, including displays of the Mueller's dry pasta products, the use of advertising slogans on packaging for consumer products or advertising of such slogans, any other materials necessary to conduct a study, and preparation of a report setting forth my finding and opinions in the case of AIPC v. New World Pasta now pending in the United States District Court for the Western District of Missouri, Western Division.

3. I am currently President and CEO of Willoughby Design Group located in Kansas City, Missouri. We have a staff of 18. We provide strategic services and brand identity design, positioning, naming, and design for brand communications, environments, packaged goods and services. Our clients include Hallmark Cards, Lee Jeans, Interstate Brands Corporation (Wonder Bread, Butternut, Hostess and Dolly Madison), The Kauffman Foundation, Playtex and Best Choice.

4. Willoughby Design Group has developed packaging and brand identity design for Max Factor, Oil of Olay, Camay, Weight Watchers, Pampers, Hills Science Diet, and Black and Decker, among others.

5. I provide advice to companies on brand and trademark issues and occasionally I have consulted with law firms on issues involving brand, trademark and trade dress.

6. In June 1994, I testified as an expert witness in the field of brand design on behalf of Luzier in the case of Bath & Body Works, Inc. and Baths, Inc. v. Luzier Personalized Cosmetics in the United States District Court for the Southern District of Ohio.

7. In addition to the clients that Willoughby Design Group serves, I am active on two National Design Boards. As a board member of AIGA (American Institute of Graphic Arts) I am responsible to 17,000 design professionals and students in design schools by providing guidance on ethics, business practices and advice on design issues. The AIGA board helps set design policy for our members and is the leading advocate for design thinking and education in the US. I am currently working on developing new standards for judging the AIGA 365 design competition on Brand Strategy and Brand Design Systems (this includes packaging). The AIGA 365 competition is the premier graphic design competition in the US. I am a judge in this year's show for Comprehensive Brand Strategies and Corporate Communications Design. I was also a judge for the 2002 competition and the 1999 competition. I am helping develop a pilot program for Executive Design Leadership at Harvard in August 2003.

16. To provide context for the evaluation of the Mueller's brand it is useful to understand the history of puffery in early advertising and good package design. Puffery is a tradition in American commerce. Since the inception of branded products manufactures have used names, slogans and symbols associated with grand ideals to boost confidence, sales and brand awareness of their products. It is both cultural and human nature that people want to buy products from companies who claim they are the best, the favorite, the biggest, the ultimate, etc. People understand intuitively the implications in names and slogans as exaggerated claims. It is part psychological and part economic that puffery is acceptable as a cultural agreement. My favorite restaurant, the best car made, etc. Our American tradition and economic model is built on that desire to improve ones life through the use of brand name products. The cosmetic market would collapse if women didn't desire to look better, all the while knowing that most of what they see and read is puffery. Only when a company is specific about measurable and factual qualities or properties of its products does a consumer expect truth, i.e. ingredient labels, nutrition facts, fabric content and made in the USA. A Chrysler ad in the New York Times, Feb 16, 03 reads, "...6 speed transmission," a measurable quality. However, it continues on "...50% American imagination, 50% German precision, 100% passion," which is puffery. See Exhibit C. Even though specific percentages of each quality are given, the consumer understands that you can't measure precision, imagination or passion, but you can measure how many speeds a transmission has. In our desire to believe Chrysler is a better car, we allow Chrysler to puff away. In Kansas City, a city famous for its steak, three different steakhouses claim the best steak in the city, but who is to say which one really is the best? See Exhibit D. Is a car bought from Superior Lexus any different than one bought from any other Lexus dealer? Is UMB really America's Strongest Bank? Other puffery examples in names and slogans: Best Western, Best Foods, Preferred Mutual Insurance Company, The Greatest Show on Earth, BMW, The Ultimate Driving Machine, Bayer, The World's Best Aspirin, Hush Puppies, The Earth's Most Comfortable Shoe, Prudential, Preferred Reality. See Exhibit E

17. At the same time in the early days of packaged goods development, when Mueller's was a new brand, it was common to adopt patriotic imagery and names that associated the product with ideas that consumers respected. Association has been used for the last 150 years to imply that one brand is better or more desirable than the competition. Manufacturers have always used associations to imbue their products with status and increase desire to purchase. Association with American symbols is one of the most long-standing traditions in branding and advertising in our country. Use of the American flag, the colors red, white and blue, and associations with American ideals is part of our cultural heritage and common agreement as both citizens and consumers. "Being American and showing patriotism is good for the country and good for commerce," we all have heard. Patriotic products reinforce our sense of belonging and purpose as a citizen of the US. Emotionally, people have always responded to products that claim to be American because they symbolize values we share as a culture. Association with famous Americans is common, and it doesn't necessarily mean they founded or support the brand, i.e. John Hancock, Dolly Madison, Washington Mutual and Franklin Mint. Other examples of companies who use a patriotic or American association to suggest a powerful or large geographic reach are First National Bank, Capitol Records, Uncle Sam's Cereal, Camel Cigarettes (American Blend), National Car Rental, American Airlines, America West Airlines, Drive the USA in Your Cheverolet, Bank of America, the New York Yankees, and Columbia Tristar Entertainment (Statue of Liberty). See Exhibit F.

18. The phrase, "America's Favorite" is an expression that has been used since the founding of our country to express patriotic ideals. A Google search turned up 647,000 uses of this phrase (see exhibit G) and most of these are pure puffery, i.e. "America's Favorite Son." The most important point I wish to make is that the phrase "America's Favorite" has multiple meanings. The phrase has no inherent specific subjective meaning or factual (objective) meaning. Only when a company links a specific claim directly to the words "America's Favorite" does the phrase acquire a specific meaning to the consumer, i.e. America's Favorite Mustard (is #1 in US sales.) A product can be #1 in sales or market share, but the phrase "America's Favorite" does not imply either a subjective or factual meaning until the manufacturer indicates why the product is America's favorite. In the case of Mueller's the consumer can "Taste why Mueller's is America's favorite pasta." This phrase is completely subjective and is considered puffery by consumers. In my experience if communicating the fact that the product is #1 in sales is important, companies will state a specific claim.

19. The Mueller's brand has evolved over a long period and the trade dress elements of the brand identity that are part of the trademark were first used starting in the early 1900's and thus have equity with consumers. The first use of the phrase "America's Favorite" on the Mueller's packaging was in the mid-fifties.

20. Mueller's brand identity (image) and trade dress was established over the past 100 years. Over the decades, consumers and generations of families have purchased the Mueller's brand based on their family experience and recognition of the product through advertising, promotions and packaging. Of these three forms of brand communication, product packaging is the most critical in terms of providing consistent visual and verbal clues and signals so that consumers can locate the product in self-service grocery chains. Notice how beer, Coke, Campbell's Soup and most packaged good products change in very small steps over the years. Even when commercials change the core products, package design and trade dress features remain consistent on TV and in the store. Coke is associated with red, Wonder Bread owns dots, BMW owns the "Ultimate Driving Machine," Hush Puppy owns "The World's Most Comfortable Shoe," Chevy owns "Like a Rock". Manufactures literally own these trade dress elements because consumers associate these visual and verbal words and graphics with the brands they buy.

21. It was the early positioning of Mueller's as an American brand, expressed in packaging through the white package with patriotic colors and symbols, that established the brand heritage that would help Mueller's build a lasting consumer bond as a trusted brand.

Advertising, pasta shapes (with American names like elbow, noodles, shells, twist, along with American recipes reinforced the association of Mueller's with American pride, home cooking in war time and peace throughout the 20th century.

Note in Exhibit B, Mueller's packaging from 1914 (the first sample found). The packaging design has remained true to their core brand trade dress although the fonts and images have been updated. Today's packaging still has dominant blue ends with a small red stripe and a white field where the brand name and brand elements are used. From 1914 until 2003 the Mueller's name is consistently red. The first use (that we have) of the flag as a trademark is in 1914. In fact, people referred to Mueller's as the flag brand during the early 1900s. Today the flag is used in a more modern form as part of the trade

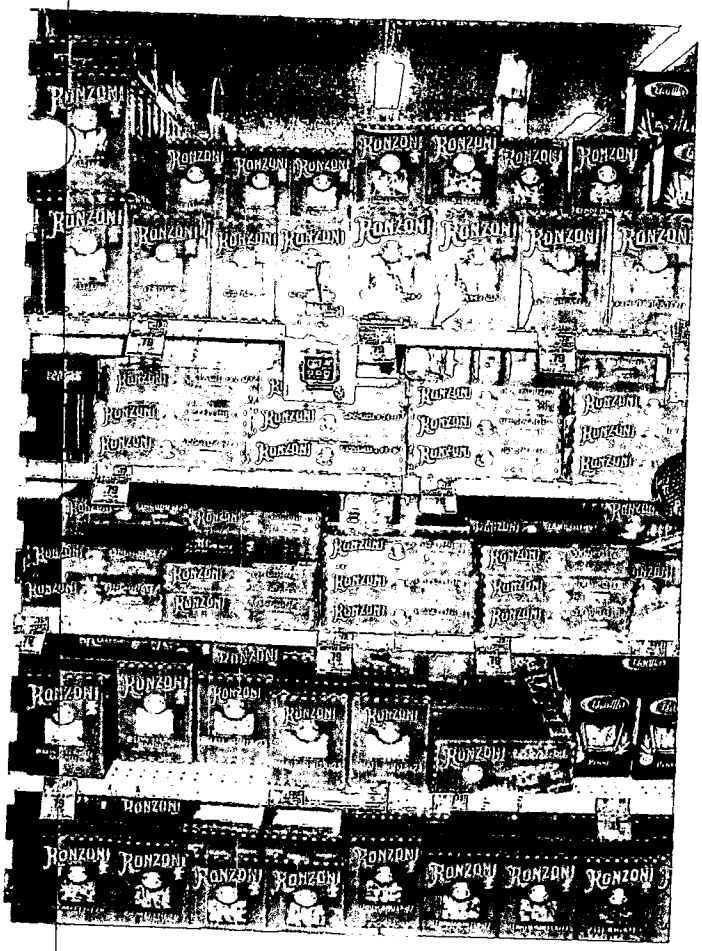
dress and brand identity as a more symbol icon (stars and stripes) than a descriptive symbol. See Exhibit H

22. In conclusion, these are my observations:
•The phrase "America's Favorite Pasta" has multiple meanings that are subjective as used by Mueller's.
•The word "favorite" is subjective and has hundreds of meanings.
•Mueller doesn't use the statement "America's Favorite Pasta" in conjuncture with one of the possible measurable meanings of favorite, i.e. number one in sales, market share etc.
•The only reference to the meaning of "America's Favorite Pasta" on the packaging is "taste" which is also a subjective term.
•AIPC's use of the term "America's Favorite Pasta" on Mueller's packaging is puffery and has no impact on the purchasing decision of the consumer other than brand recognition.
•Mueller's has used the phrase "America's Favorite" beginning in the 1950's on either packaging or in promotions.
•The phrase "America's Favorite Pasta," the colors, logo, patriotic symbols and American associations (as distinct from Italian, see Exhibit I) are all part of Mueller's long brand heritage and are familiar to generations of American families.
•Mueller's brand heritage is expressed in these trade dress features, evolved over 100 years with cultural and commercial acceptance.
•All of these trade dress features, including the phrase "America's Favorite Pasta," serve as a trademark function and help consumers recognize the Mueller's brand.

Ann Willoughby

Ann Willoughby 02/21/03

Date



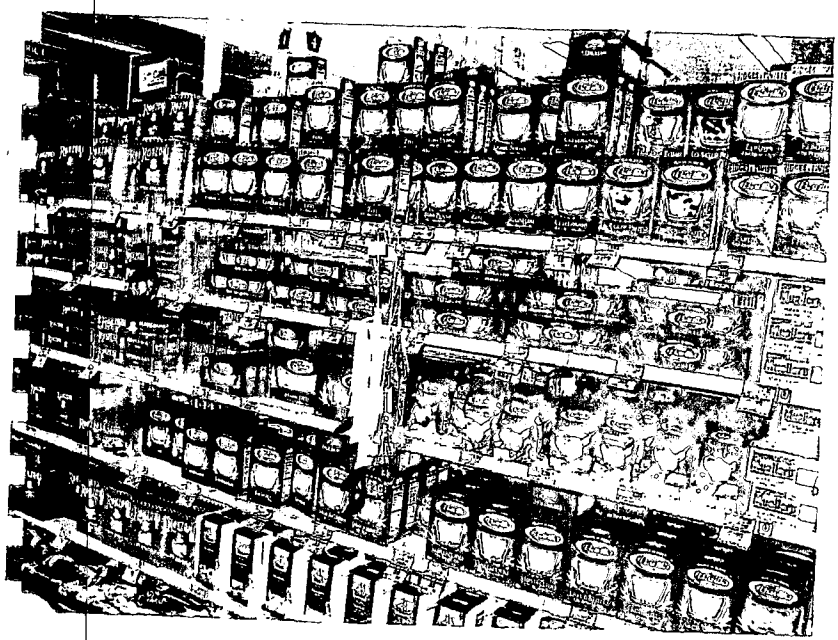


Exhibit A

THE DESIGN CAPITAL OF AMERICA
IT'S WELL WITHIN OUR REACH

Ingram's October cover headline, "Building a Greater Kansas City, The Architectural/Design Capital of America," caught my attention. I love the sound of "The design capital of America" as in "I am from Kansas City, you know, the design capital." But is it possible? Or even desirable?

I think it is not only possible for Kansas City to be one of the leading design centers in the world, it is one of the best opportunities for KC to succeed as an economic leader in coming decades. Please allow me to explain and perhaps paint a somewhat optimistic, but entirely plausible, picture of how this scenario might unfold.

Richard Florida, author of The Rise of the Creative Class, says, "Human creativity—the ability to generate and implement new ideas—is the key to economic growth." If this is true, and I believe it is, Kansas City should welcome talented young designers, scientists, engineers, architects, researchers, artists and writers with open arms. We should support and nurture the creative communities that already exist.

One way to realize this vision of growth is to invite and support the next generation of KC business. Be a mentor.

Back in the 1970s, I started my design business in the newly developed Westport Square. It was a moment when almost every business in Westport was run by a young entrepreneur. Westport was a cluster of creative people who fed off of each other's enthusiasm, ideas and mutual support. And everyone wanted to be near what was then Kansas City's creative epicenter. However, an important ingredient in Westport's early success was the corporate and civic investment, both economic and social.

So what will it take for Kansas City to become a creative design center in this decade when the bottom line is often the most immediate factor in determining our investment strategies?

Perhaps we need a better understanding of the value-link between the creative factor and Kansas City's future economic, social and cultural health.

The creative factor is about investing in people and the creative environment that nurtures them. No one could have predicted that Joyce Hall would have started a social expression empire or that Ewing Kauffman would build a multi-billion dollar pharmaceutical company.

We became the engineering hub in the early twentieth century because bright young engineers like Clinton Burns and Robert McDonnell, E.B. Black and Tom Veatch were on the leading edge of solving the technical and geographic transportation problems of their day. They built bridges, clean water and sewage facilities, tunnels, highways, airports, power plants: the physical infrastructure for our young country.

Because of this legacy, our engineering firms design the most famous stadiums in the world today.

Because of Joyce Hall's legacy to design, Hallmark is still able to recruit top design talent out of the best design schools and pay them competitive national wages.

The ability of a city to attract the best creative minds and knowledge-based workers ultimately helps business and fosters entrepreneurs (think Hallmark, Cerner, Sprint, Marion Labs, Black & Veatch). As companies move from tangible, physical assets as their primary sources of wealth to intellectual capital, these young minds will create new wealth in patents, brands and processes that will drive growth and value in the future.

One way to realize this vision of growth is to invite and support the next generation of KC business. Be a mentor. Share your passion and expertise. Help nurture ideas and show enthusiasm for fledgling efforts. By being responsive and open to creative new ideas, the arts, science and technology, you are surely contributing to a stronger (and more interesting) Kansas City business community.

And, to the possibility that we all can proudly say we are from "the design capital of the United States."

Ann Willoughby *is Founder and President of Kansas City-based Willoughby Design Group founded in 1978. She is on the AIGA National Board of Directors and the steering committee of AIGA Brand Experience. You can reach her at ann@willoughbydesign.com or at 816-561-4189.*

d. 2001 – How Magazine International Design Annual
1 Merit Award

e. 2001 – How Magazine Self Promotion Competition
4 Awards

f. 2000/2001 – AAF 9th District ADDY Competition
6 ADDY Awards
4 Citations of Excellence

g. 2001 – Graphic Design:usa American Graphic Design Award

h. 2001-Graphis Letterhead 5
1 Award

i. 2001 – National Mature Media Awards
2 Awards

j. 1999/2000 – AAF 9th District ADDY Competition
2 Citations of Excellence

k. 2000 Omni's – American Advertising Awards (Ad Club of Kansas City)
4 Gold Awards
8 Silver Awards
7 Bronze Awards

l. 2000 – PRINT's Regional Design Annual
2 Awards

m. 1999 Omni's – American Advertising Awards (Ad Club of Kansas City)
4 Gold Awards
5 Silver Awards
9 Bronze Awards

n. 1998 Omni's – American Advertising Awards (Ad Club of Kansas City)
2 Gold Awards

o. 1996 Omni's – American Advertising Awards (Ad Club of Kansas City)
7 Gold Awards

p. 1992 and 1990 – Kansas City art Director's Show
1 Gold Award each year

q. 1989 – Kansas City Art Director's Show
1 Silver Award

r. 1988 – University and College Designers Association
1 Award

Ann Willoughby

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Kansas City, MO 64111
Phone: 816-561-4189
Fax: 816-561-5052

Home: 1025 W. 60th Terrace
Kansas City, MO 64113
Phone: 816-333-6417
Fax: 816-333-3190

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Willoughby Design Group has developed packaging and brand identity design for Max Factor, Oil of Olay, Camay, Weight Watchers, Pampers, Hills Science Diet, Black and Decker, among others.

Professional Associations
AIGA National Board of Directors
AIGA National Board for Center for Brand Experience
AIGA Kansas City Chapter Advisory Board
HOW Magazine Editorial Board
Kansas City Ad Club member

Civic Boards
Kansas City Zoo Board
De La Salle Board

My company, Willoughby Design Group, has received a number of national and regional awards for brand identity design including:

a. 2002 – How Magazine Self-Promotion Annual

b. 2002 Prism Award

c. 2001 Omni's – American Advertising Awards (Ad Club of Kansas City)
Best of Show
6 Gold Awards
5 Silver Awards
3 Bronze Awards

s. 1988 Omni's – American Advertising Awards (Ad Club of Kansas City)
1 Gold Award
3 Silver Awards

t. 1988 – Kansas City Art Directors Show
1 Silver Award

u. Print Magazine's Regional Design Annual
3 Awards

v. 1987 – Communication Arts Design Annual
1 Award

w. 1987 Omni's – American Advertising Awards (Ad Club of Kansas City)
1 Gold Award
2 Silver Awards

x. 1987 – Kansas City Art Director's Show
6 Gold Awards

y. 1987 – New York Art Director's Show
1 Award

z. 1987 – Print Magazine's Regional Design Annual
3 Awards

aa. 1986 – Kansas City Art Director's Show
2 Gold Awards
1 Silver Award

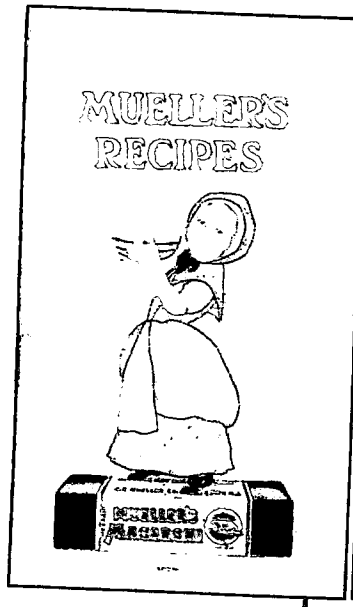
bb. 1986 Omni's – American Advertising Awards (Ad Club of Kansas City)
1 Gold Award
5 Silver Awards

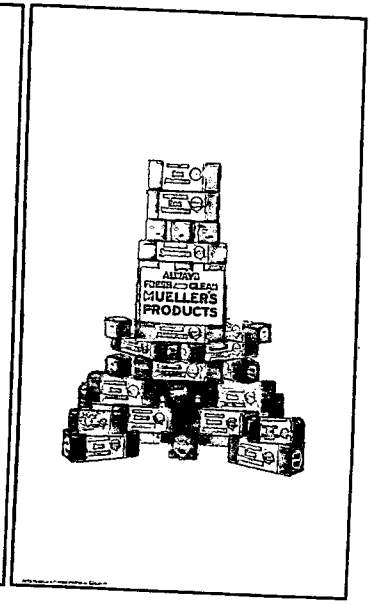
cc. 1986 – Print Magazine's Regional Design Annual
2 Awards

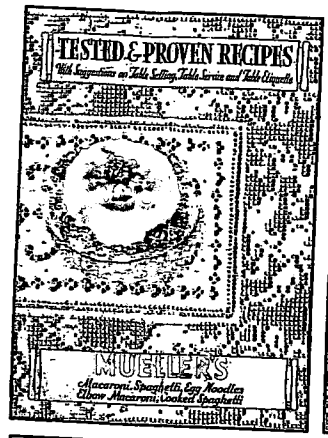
Teaching Experience
I have taught at the University of Kansas and the Kansas City Art Institute. As a visiting professor at KU I was instrumental in building a pilot program that helped graduating seniors and business create successful hiring models.

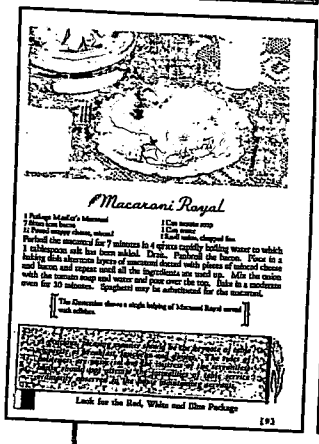
Expert Testimony
In June 1994, I testified as an expert witness in the field of brand design on behalf of Luzier in the case of Bath & Body Works, Inc. and Baths, Inc. v. Luzier Personalized Cosmetics in the United States District Court for the Southern District of Ohio.

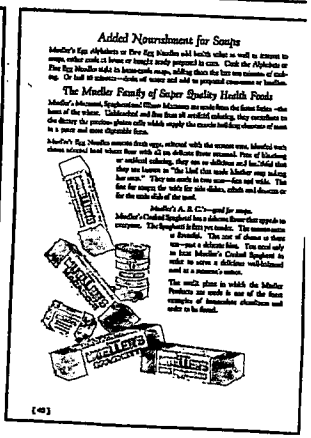
Exhibit B











1893

Charles Frederick Mueller's homemade egg noodles first appeared on grocery store shelves.

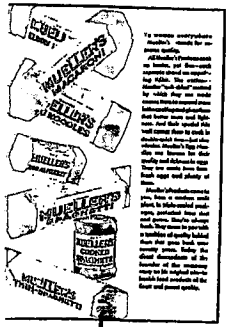
1914

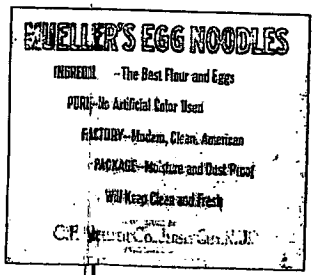
The Flag Brand

1930

Look for the Red, White and Blue Package

America's Largest Selling Brand





1937

1940s

1947

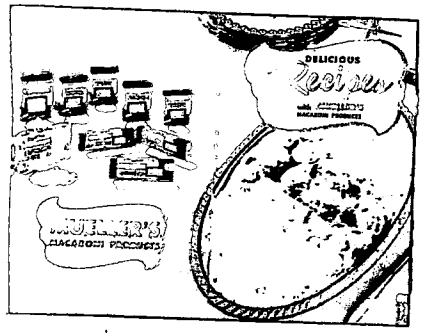
1949

To women everywhere "Mueller's" stands for supreme quality.

FACTORY—Modern, Clean, American

The Mueller's family sells their company to a New York Law School beneficiary.

AMERICAN



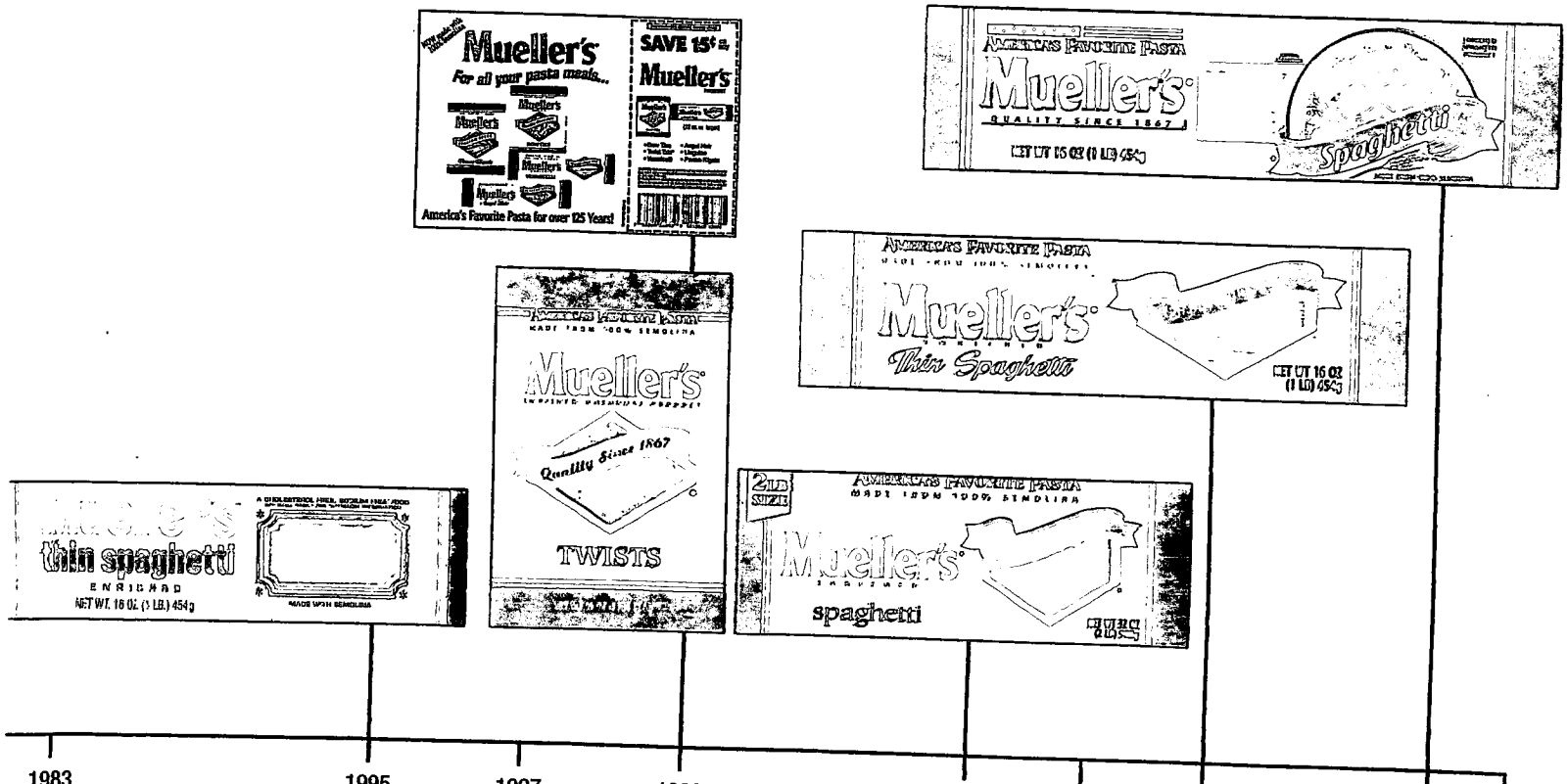
1950's

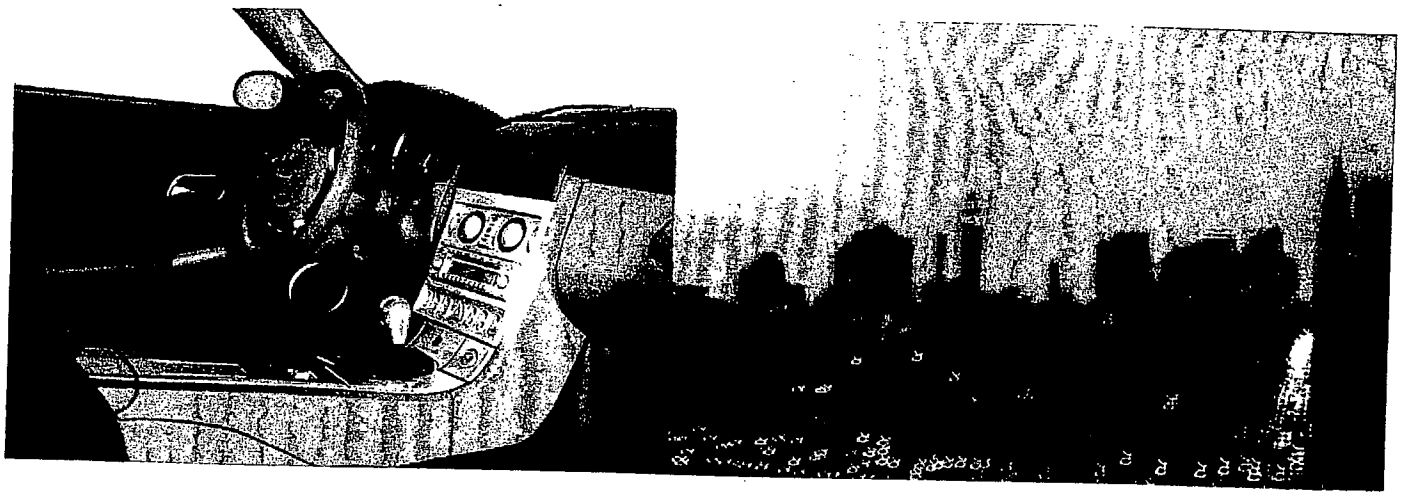
First known use of "America's Favorite" on packaging.

1976

Foremost-McKesson, Inc. purchases Mueller's from the New York Law School

1978


Mueller's
For all your pasta meals...
America's Favorite Pasta for over 125 Years!
SAVE 15¢
Mueller's
Mueller's
Quality Since 1867
TWISTS
Mueller's
thin spaghetti
ENRICHED
NET WT. 16 OZ. (1 LB.) 454 g
AMERICAN FAVORITE PASTA
Mueller's
spaghetti
2LB SIZE
AMERICAN FAVORITE PASTA
Mueller's
Thin Spaghetti
AMERICAN FAVORITE PASTA
Mueller's
QUALITY SINCE 1867
Spaghetti
1983
1995
1997
1998
1999
2000
2001
2002
2003
estfoods purchases
the ueller
business from
remost-McKesson.
American Italian Pasta
company (AIPC) becomes
the exclusive manufacturer
of Mueller's for Bestfoods.
America's Favorite Pasta for over 125 Years!
AMERICA'S FAVORITE PASTA
AIPC purchases the exclusive
rights to own all aspects of the
ueller's pasta business –
uming the responsibility
.r packaging, distribution,
pricing and marketing of the
AMERICA'S FAVORITE PASTA



THE CHRYSLER CROSSFIRE

REAR WHEEL DRIVE

SIX SPEED MANUAL TRANSMISSION

50% AMERICAN INGENUITY

50% GERMAN PRECISION

100% PASSION

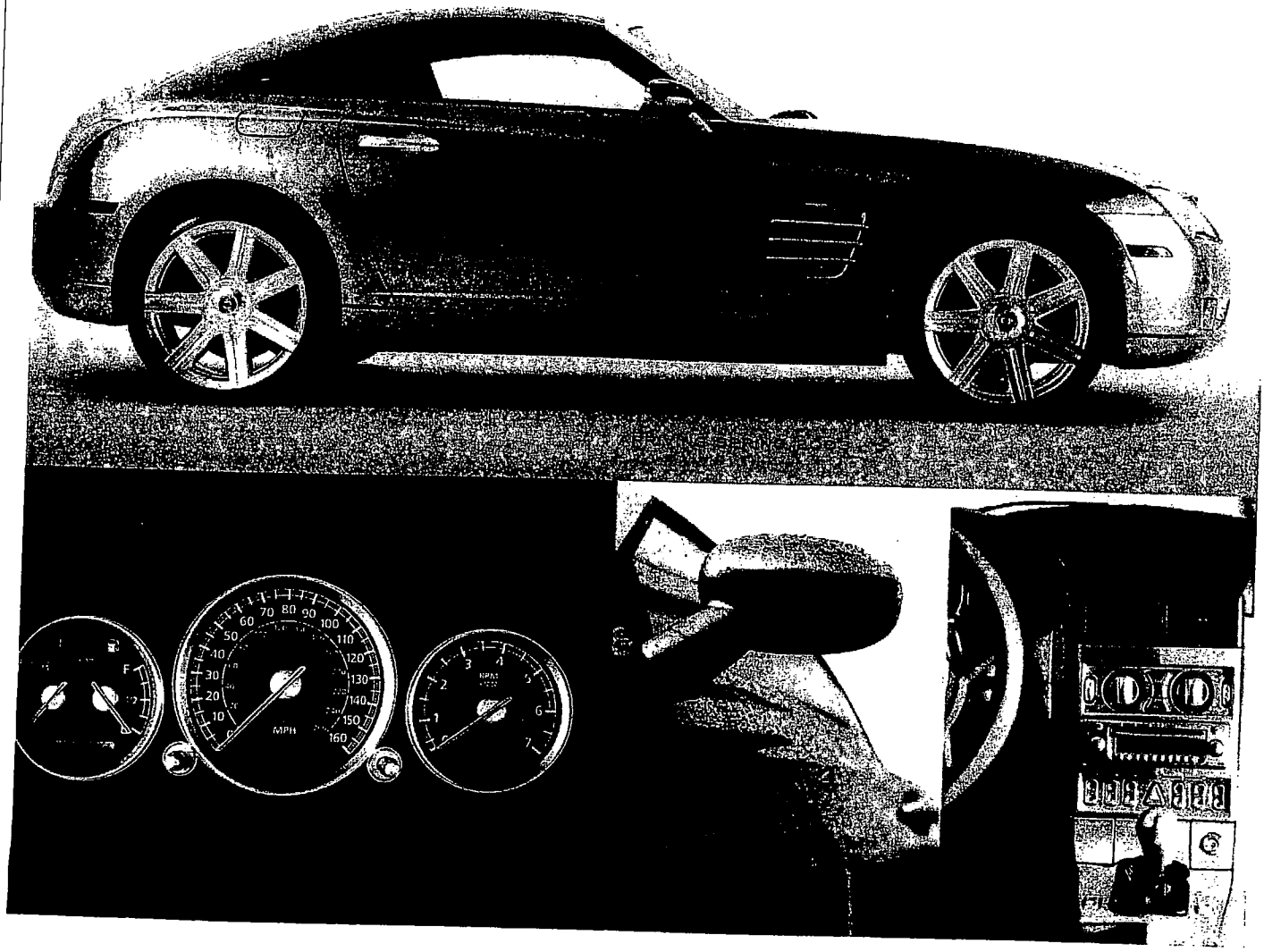


Exhibit C

The Majestic Steakhouse-
"The finest in beef, jazz and fun!"

* THE MAJESTIC STEAKHOUSE *

931 BROADWAY
KANSAS CITY, MISSOURI 64105-1508

816-471-8484 (voice)
816-471-8686 (fax)
majesticsteak@mindspring.com
info@majesticgroup.com (e-mail)

COME JOIN IN THE FUN!

[Specialties]
[Lunch Menu] [Dinner Menu]
[The Restaurant Cigar Club] [Independent Review]
[Entertainment] [Gifts] [Map/Directions]

Located at 10th and Broadway in the Historic Fitzpatrick Saloon Building in Downtown Kansas City, The Majestic Steakhouse offers the best in Beef, Jazz and Fun! The old Fitzpatrik Building was originally a saloon and bordello built in 1911. During the liquor Prohibition of the 1930's, the basement was used as a Speakeasy and a meeting place for many of Kansas City's business and political leaders. The building was renovated in the mid- 1980's to its former grandeur and is listed on the National Register of Historic Places. Long a tradition in Kansas City, The new Majestic Steakhouse opened its current location in March 1993, reviving a tradition of Fantastic Steaks and Great Times that was famous for forty years at the old Majestic at East 31st Street and Holmes Road.

The Golden Ox-
"Kansas City's Finest Steak"

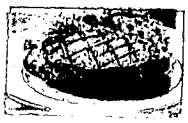
THE GOLDEN OX

Kansas City's finest steak

MENU
RESERVATIONS
HISTORY
MAIL ORDER STEAKS
CONTACT US
HOME

the Golden Ox menu

Our steaks are broiled over a sharp, hot flame from real charcoal that finishes the meat to a sear on the outside - juicy and tender within - seals the rich juices that add to the tantalizing taste and aroma.



From Our Hickory Charcoal Broiler

Kansas City Strip
The steak was born here, (our #1 Seller), for the hearty eater, a boneless sirloin from premium steers, aged to perfection.
24oz.(Bone-In) $32.95, 14oz. $25.95

Filet Mignon
Of the finest beef tenderloin
10oz. $26.95, 7oz. $21.95

The Hereford House-
"The Best Steak in Kansas City"

ANDERSON
RESTAURANT GROUP

HEREFORD HOUSE

HEREFORD HOUSE
ORDER STEAKS AND GIFT CERTIFICATES ONLINE

PIERPONTS

HR
HOLLYWOOD ROOM

CATERING SOLUTIONS

**** KANSAS CITY'S ORIGINAL ****

HEREFORD HOUSE
EST. 1957

KANSAS CITY • LEAWOOD • LAWRENCE • INDEPENDENCE

Special Steak Package Offers for Local Pickup!

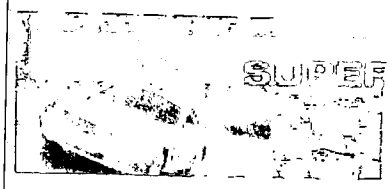
Order Gift Certificates HERE!

Hereford House chefs excel in the art of selecting the finest beef, patiently aging it to the peak of tender, flavorful perfection and serving it to you straight from the charcoal grill savory, succulent and sizzling. The magic of the Hereford House — a relaxed congenial atmosphere, superb food, your favorite cocktails and friendly service — makes your visit a special occasion.

Join our exclusive E-mail Specials Club HERE!

A restaurant only stays in business for 44 years if it serves the BEST STEAK IN TOWN!

Exhibit D



Unilever Bestfoods North America

Preferred Mutual Insurance Company

MIDWEST EXPRESS AIRLINES
The best care in the air.

Prudential Preferred Realty

AMERICA'S STRONGEST BANKS

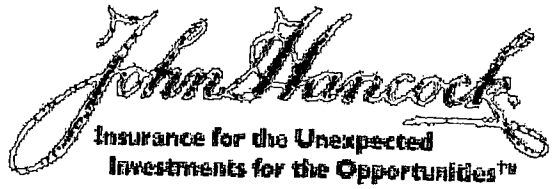
Best Western

The Ultimate Driving Machine

UMB Financial Corporation

RINGLING BROS. AND BARNUM & BAILEY THE GREATEST SHOW ON EARTH

Exhibit E


John Hancock
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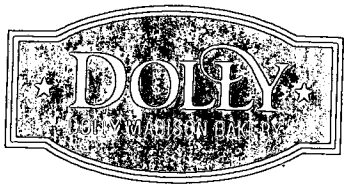
UNCLE SAM'S
COFFEE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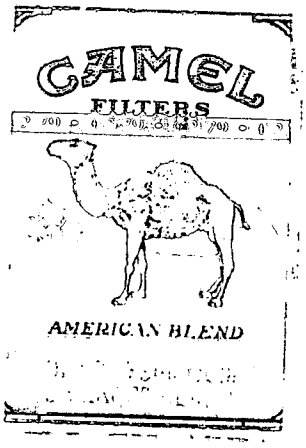
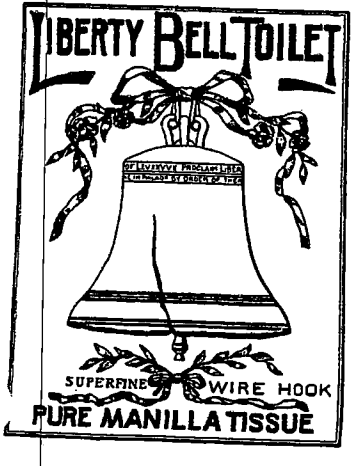
COLLINS CIGAR CO.
OUR COUNTRY'S PRIDE
3 For 5
CHEROOTS.


Mobil


Betsy Ross Flour


CAMEL
FILTERS
AMERICAN BLEND


LIBERTY BELL TOILET
SUPERFINE
WIRE HOOK
PURE MANILLA TISSUE


AMERICA WEST AIRLINES


AmericanAirlines


Bank of America.

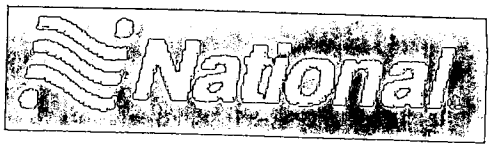
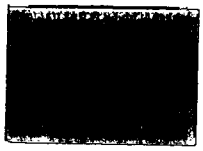

National

Exhibit F



History of the Hereford House

On October 1, 1957, Jack C. Webb began a Kansas City tradition—the Hereford House—that endures to this day. Located close to stockyards that processed the finest corn-fed beef from Missouri, Kansas, Iowa, and Nebraska, the Hereford House popularity was natural in a city considered the major beef capital of the Midwest. "Locals" from as far away as Sedalia traveled to dine on America's finest steaks. Dinner at the Hereford House was on the itineraries of Kansas City visitors.

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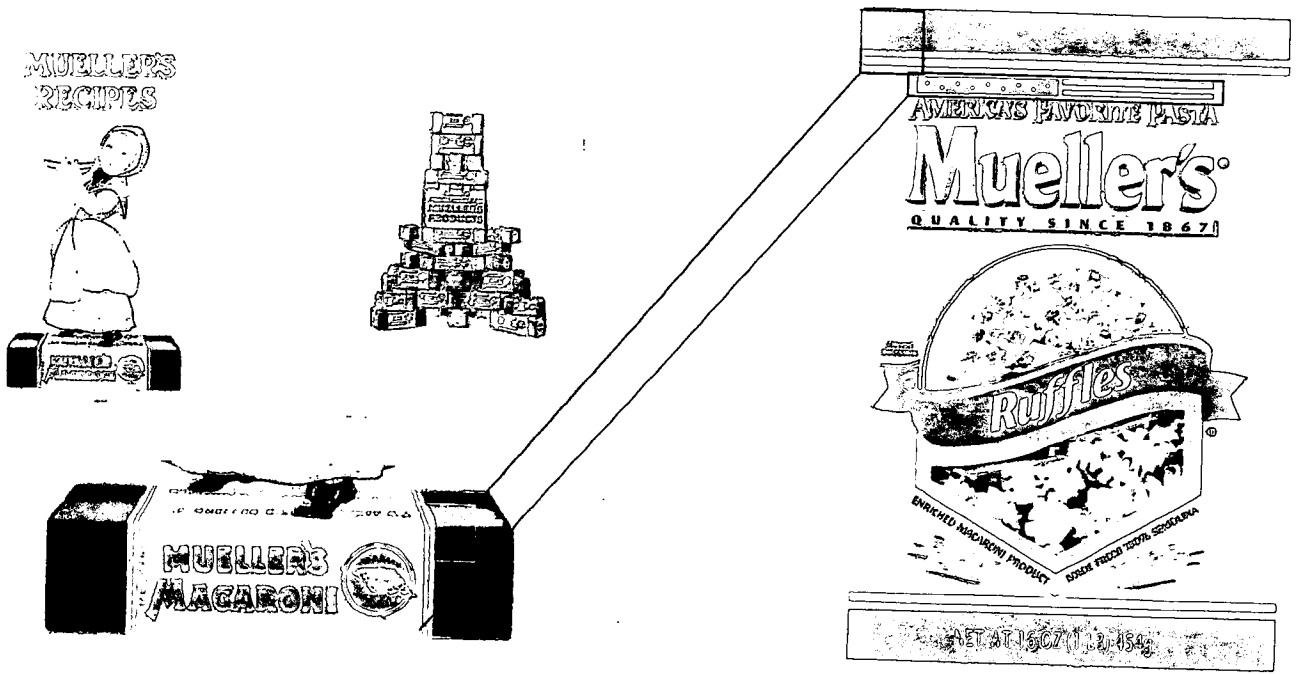
Exhibit G

Packaging Comparison, 1914 to the present



Mueller's is an American brand, with remarkably consistant packaging dating back to 1914.

- Red white and blue package
- ~~American Flag on package - "The Flag Brand"~~
- American rather than Italian pasta names and r

Dominant use of red, white, and blue
Stars and stripes shows it is a flag brand
American description for pasta name
Distinctly American recipes on box.
Mostly white package

Use of green, white and red represents the Italian flag
Claims it is Italy's #1 pasta
Italian description for pasta name
Multi-lingual packaging
Mostly blue package

Triangle pattern and type treatment
Is more Old World Style
Italian description for pasta name
Mostly blue package
Distinctly Italian recipes on box

Exhibit I

BIOGRAPHY

NAME	Ann Willoughby
TITLE	Founder/President

Ann Willoughby is the President and Creative Director of Willoughby Design Group, a brand innovation and identity design firm she founded in 1978. Willoughby Design has developed brand identity systems for ground-breaking retail start-ups including Three Dog Bakery, Einstein Bros Bagels, Noodles, SPIN! and Kevin Carroll. Other retail clients include Buckle, Lee Company, Hallmark, Interstate Brands Corporation, Playtex and Nestle.

Each year more and more companies turn to Ann and her collaborative team of 18 to help them create innovative products, communications and brand experiences that that bring heightened beauty, emotion, simplicity and meaning to new generations.

Willoughby's holistic approach to design and business is reflected in the company's unique studio environment — a collaborative space where designers work alongside entrepreneurs, strategists, writers and specialists to innovate. The Willoughby studio, complete with a meditation room and off-site Design Barn retreat helps attract and retain top creative talent and brings blue chip clients to Kansas City.

Ann is a former National Board Director for AIGA, the professional asso-

[602] WESTPORT ROAD KANSAS CITY, MO 64111 PHONE: 816. 561. 4189 FAX: 816. 561. 5052
WEB SITE: WWW.WILLOUGHBYDESIGN.COM

EXHIBIT
B

ciation for design. Ann serves on the National Board for AIGA Center for Brand Experience and is a member of the Editorial Board of HOW magazine. She was co-chair of the 2004 AIGA Business & Design Conference in New York.

Ann attended the pilot AIGA design leadership program at Harvard Business School and in 2005 the Aspen Design Summit. Ann is a frequent design judge and in 2005 served as judge for Communication Arts Design Annual 2005, the Dallas Society of Visual Communication, Hawaii's 5-0 Design Competition and the 11th Y Design Conference in San Diego.

The Willoughby team currated and designed "The Best of Brochure Design" for Rockport Publishers, Inc. as well as the Dictionary of Brand from A-Z for the AIGA Center for Brand Experience.

Willoughby Design Group has won awards from Print, Communication Arts, Graphis, and AIGA and has been published for over 25 years in national and international competitions and books. In 2005 Rockport selected Willoughby Design Group as one of the best Design Firms in US. Also in 2005 the firm was awarded a HOW Perfect TEN award for Kevin Carrol's identity and book, "Rules of the Red Rubber Ball."

Ann has taught design at the University of Kansas and at the Kansas City Art Institute. As a Visiting Professor at K.U., she was instrumental in building a pilot program that helped graduating seniors and businesses create successful engagement models. Teaching and Community outreach to women and children remain two of Ann's passions as she works with many organizations through her firm and the Willoughby Design Barn.

[602] Westport Road Kansas City, MO 64111 Phone: 816. 561. 4189 Fax: 816. 561. 5052
Web Site: www.willoughbydesign.com

NEW LOOK!
SAME GREAT TASTE

MUELLER'S

Quality Since 1867

America's Favorite Pasta

Sea Shells

ENRICHED MACARONI PRODUCT

COOKING TIME 11-12 minutes

MADE WITH NORTH AMERICAN GROWN DURUM WHEAT

NET WT 16 OZ (1 LB) 454 g

EXHIBIT

B

tabbies

A GOOD CARB

Did you know that pasta is really a **GOOD CARB**?

PASTA has only a moderate effect on blood glucose levels, unlike other starches such as white bread, rice and potatoes, which means **PASTA** is not as readily converted into sugar.

PASTA is low on the *Glycemic Index* (GI) - and low GI Foods are digested more slowly, stay in the digestive system longer and help to naturally satisfy hunger! So, eating a delicious meal that includes **PASTA** can truly be one of your more healthful alternatives.

For more information about the Glycemic Index, Visit www.glycemic.com

GENERAL GLYCEMIC INDEX OF COMMON FOODS		
PASTA Kidney Beans	→	**LOW:** 0-55 GI
Granola Bar Rye Bread	→	**MEDIUM:** 55-70 GI
Baked Potato White Rice	→	**HIGH:** 70 + GI

Eat Lower GI foods as a more healthful alternative!

COOKING DIRECTIONS

1. **BOIL** water (4 quarts per 16 oz of pasta).
2. **ADD** salt to taste (optional).
3. **ADD** pasta. Wait for reboil.
4. **COOK** uncovered, stirring occasionally, 11 to 12 minutes or until desired tenderness.
5. **REMOVE** from heat and drain.

TIP- If preparing a pasta salad, rinse with cold water after draining.

MUELLER'S

Sea Shells Con Broccoli

PREP TIME: 10 MIN COOK TIME: 10 MIN SERVES: 4

16 oz	Mueller's® Sea Shells
4	cups fresh broccoli florets, uncooked
1/4	cup extra virgin olive oil
4	cloves garlic, minced or 1 tsp garlic powder
1	tsp dried basil
1/2	tbsp dried rosemary
1/4	cup sun dried tomatoes, chopped fine
1/4	cup white wine (optional)
1	cup chicken or vegetable broth
1	cup Parmesan cheese
	Salt and pepper to taste

- Cook Sea Shells according to package directions, adding broccoli the last 2 minutes of cooking time.
- Drain, cover and set aside.
- Heat olive oil in a large skillet; add garlic, basil, rosemary and sun dried tomatoes.
- Cook 1 minute.
- Add wine and reduce by 1/2. Add broth.
- Toss in broccoli and shells; stir until heated through.
- Add cheese and season to taste with salt and pepper.

MAKES A MEAL

VISIT MAKESAMEAL.COM FOR OTHER DELICIOUS RECIPES

Nutrition Facts

Serving Size 3/4 cup (56g) dry
Servings Per Container 8

Amount Per Serving

Calories 210 Calories from Fat 10

	% Daily Value*
Total Fat 1g	2%
Saturated Fat 0g	0%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 0mg	0%
Total Carbohydrate 41g	14%
Dietary Fiber 2g	8%
Sugars 2g	
Protein 7g	

Vitamin A 0%	•	Vitamin C 0%	
Calcium 0%	•	Iron 10%	
Thiamine 30%	•	Riboflavin 15%	
Niacin 20%	•	Folate 25%	

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

	Calories:	2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g

Calories per gram:
Fat 9 • Carbohydrate 4 • Protein 4

INGREDIENTS: DURUM SEMOLINA, NIACIN, FERROUS SULFATE (IRON), THIAMINE MONONITRATE, RIBOFLAVIN, FOLIC ACID.
CONTAINS WHEAT INGREDIENTS

DISTRIBUTED BY: AMERICAN ITALIAN PASTA CO.
KANSAS CITY, MO 64116

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2	78228428	2806008	AMERICA'S FAVORITE HUMMUS	TARR	LIVE
3	78327004		AMERICA'S FAVORITE CHATLINE	TARR	DEAD
4	78521306		AMERICA'S FAVORITE ZOO	TARR	DEAD
5	78276913		AMERICA'S FAVORITE TOOL STORE	TARR	LIVE
6	78771263		AMERICA'S FAVORITE MAGAZINES	TARR	LIVE
7	78704378		AMERICA'S FAVORITE	TARR	LIVE
8	78699665		AMERICA'S FAVORITE BRAND OF FLOSSERS	TARR	LIVE
9	78683283		AMERICA'S FAVORITE	TARR	LIVE
10	78673866		"AMERICA'S FAVORITE CAN 'O' CORN OF THE DAY"	TARR	LIVE
11	78649723		AMERICA'S FAVORITE NEW GUITAR	TARR	LIVE
12	78639846		AMERICA'S FAVORITE FLOSS PICKS	TARR	LIVE
13	78639835		AMERICA'S FAVORITE FLOSSERS	TARR	LIVE
14	78628068		AMERICA'S FAVORITE SHRIMP	TARR	LIVE
15	78549463		AMERICA'S FAVORITE CHEESECAKE	TARR	LIVE
16	78468067		AMERICA'S FAVORITE ANYTIME, ALL-THE-TIME, SPREADABLE CHEESE	TARR	LIVE
17	78410564	2997476	TRACKER AMERICA'S FAVORITE BOATS	TARR	LIVE
18	78410557	2956254	AMERICA'S FAVORITE BOATS	TARR	LIVE
19	78344059	2961590	AMERICA'S FAVORITE CRABMEAT	TARR	LIVE
20	78343879	2994383	AMERICA'S FAVORITE POPCORN	TARR	LIVE
21	78325818		AMERICA'S FAVORITE FASTIME	TARR	DEAD
22	78243784		AMERICA'S FAVORITE	TARR	DEAD
23	78241127	2853695	TUMARO'S GOURMET TORTILLAS AMERICA'S FAVORITE GOURMET TORTILLAS	TARR	LIVE
24	78190013	2864842	AMERICA'S FAVORITE GARAGE DOORS	TARR	LIVE
25	78188423	2903131	AMERICA'S FAVORITE GARAGE DOORS	TARR	LIVE
26	78136703		BARILLA - AMERICA'S FAVORITE PASTA	TARR	LIVE

27	78103271	2639844	AMERICA'S FAVORITE FEAST	TARR	LIVE
28	78092948	2667446	AMERICA'S FAVORITE DOWN PAYMENT GIFT PROGRAM	TARR	LIVE
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53	76388158		AMERICA'S FAVORITE MATTRESS	TARR	DEAD
54	76361973	2768392	AMERICA'S FAVORITE SHOPPING DESTINATIONS	TARR	LIVE
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56	76302605	2762465	TUMARO'S AMERICA'S FAVORITE GOURMET TORTILLA	TARR	LIVE
57	76297574		AMERICA'S FAVORITE THRIFT STORE	TARR	DEAD
58	76281737	2722791	AMERICA'S FAVORITE FLAVORS	TARR	LIVE
59	76281377	2711987	CHECKS - AMERICA'S FAVORITE WAY TO PAY	TARR	LIVE
60	76261515	2604337	AMERICA'S FAVORITE CHEESESTEAKS STEAK ESCAPE	TARR	LIVE
61	76261218	2561713	AMERICA'S FAVORITE CHEESESTEAK	TARR	LIVE
62	76242730	2520064	AMERICA'S FAVORITE MUSHROOM	TARR	LIVE
63	76217835	2706118	THE BOUNDARY WATERS JOURNAL THE MAGAZINE OF AMERICA'S FAVORITE WILDERNESS AREA	TARR	LIVE
64	76213647	2566340	AMERICA'S FAVORITE WATER HEATER	TARR	LIVE
65	76164405		AMERICA'S FAVORITE FOOD COMPANY	TARR	DEAD
66	76153049	2506337	AMERICA'S FAVORITE REPLACEMENT WINDOW	TARR	LIVE
67	76147170		AMERICA'S FAVORITE THRIFT STORE	TARR	DEAD
68	76049771	2586795	AMERICA'S FAVORITE BOATING SUPPLY SOURCE	TARR	LIVE
[illegible]	76049173		AMERICA'S FAVORITE BIKER BAND	TARR	DEAD
70	76047579	2641675	AMERICA'S FAVORITE SNACK CAKES	TARR	LIVE
71	76015835	2535729	AMERICA'S FAVORITE GOLF SCHOOLS	TARR	LIVE
			AMERICA'S BEST MALLS. AMERICA'S FAVORITE STORES. ONE		

72	76012919		CLICK	TARR	DEAD
73	75538444	2263243	AMERICA'S FAVORITE	TARR	LIVE
74	75838350	2479220	AMERICA'S FAVORITE WORKBOOTS	TARR	LIVE
75	75458364	2242272	AMERICA'S FAVORITE OMELETTES	TARR	DEAD
76	75768708	2347915	AMERICA'S FAVORITE SOUR GUM	TARR	LIVE
77	75389220	2224026	BONGO BLUE JEANS ALWAYS AMERICA'S FAVORITE	TARR	DEAD
78	75075681	2090705	LIPTON	TARR	LIVE
79	75350410	2210635	DANCER	TARR	DEAD
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82	75940998		AMERICA'S FAVORITE WAY TO DIAL	TARR	DEAD
83	75940997		AMERICA'S FAVORITE SECRETARY	TARR	DEAD
84	75940996		AMERICA'S FAVORITE DIALING ASSISTANT	TARR	DEAD
85	75940995	2590036	AMERICA'S FAVORITE VOICE MAIL	TARR	LIVE
86	75940994	2590035	AMERICA'S FAVORITE EMAIL ASSISTANT	TARR	LIVE
87	75940993		AMERICA'S FAVORITE TECHNOLOGY ASSISTANT	TARR	DEAD
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93	75884602		COLLECTORS AUCTION SERVICES AMERICA'S FAVORITE ON-LINE	TARR	DEAD
94	75882332	2514110	AMERICA'S FAVORITE MUSIC	TARR	LIVE
95	75856894	2586743	AMERICA'S FAVORITE QUIZ SHOW	TARR	LIVE
96	75832888	2420309	AMERICA'S FAVORITE SKINLESS CHICKEN SINCE 1981	TARR	LIVE
97	75832887	2458792	AMERICA'S FAVORITE SKINLESS CHICKEN SINCE 1981	TARR	LIVE
98	75775135		AMERICA'S FAVORITE LAWYER	TARR	DEAD
99	75774334		AMERICA' S FAVORITE FOODS	TARR	DEAD
100	75738157	2467054	AMERICA'S FAVORITE TRUCK CAMPER	TARR	LIVE

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108	75658312	2520689	AMERICA'S FAVORITE WAY TO PAY	TARR	LIVE
109	75649169		AIR JAMAICA, AMERICA'S FAVORITE VACATION AIRLINE	TARR	DEAD
110	75627265		TRY-FOODS AMERICA'S FAVORITE RECIPES	TARR	DEAD
111	75618178	2419870	TUMARO'S GOURMET TORTILLAS -- AMERICA'SFAVORITE	TARR	LIVE
112	75606188	2390933	TEMO SUNROOMS "AMERICA'S FAVORITE ENVIRONMENT"	TARR	LIVE
113	75596149		AMERICA'S FAVORITE THRILLS	TARR	DEAD
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118	75547200	2306720	AMERICA'S FAVORITE BUSINESS GIFTS	TARR	LIVE
119	75535497	2392406	AMERICA'S FAVORITE KARTING STORE!	TARR	LIVE
120	75512852	2331109	MISTER SPARKY AMERICA'S FAVORITE ELECTRICIAN	TARR	LIVE
121	75501805	2299622	AMERICA'S FAVORITE FOODS PRESTO	TARR	LIVE
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[illegible]	75466437		AMERICA'S #1 FAVORITE JERKY	TARR	DEAD
[illegible]	75461137		AMERICA'S FAVORITE DRIVE-THRU	TARR	DEAD
126	75457625		AMERICA'S FAVORITE COUPONS	TARR	DEAD
127	75456434		AMERICA'S FAVORITE FLEECE	TARR	DEAD

128	75441945		AMERICA 'S FAVORITE GAME SHOW	TARR	DEAD
129	75406843		AMERICA'S FAVORITE HOLIDAY CANDY	TARR	DEAD
130	75367814		AMERICA'S FAVORITE BRANDS	TARR	DEAD
1	75346324	2425990	DELTA CERAMCOAT - AMERICA'S FAVORITE ACRYLIC PAINT	TARR	LIVE
132	75316084		AMERICA'S FAVORITE VACATION COMPANY	TARR	DEAD
133	75314111		SINCE 1916 NATHAN'S FAMOUS AMERICA'S FAVORITE HOT DOG	TARR	DEAD
134	75314110		AMERICA'S FAVORITE HOT DOG	TARR	DEAD
135	75241284	2154372	AMERICA'S FAVORITE CORN DOG	TARR	LIVE
136	75222072	2149887	AMERICA'S FAVORITE CHOCOLATE CHIP COOKIE!	TARR	LIVE
137	75203375		AMERICA'S FAVORITE BRAND	TARR	DEAD
138	75202636	2360994	AMERICA'S FAVORITE FRIES	TARR	LIVE
139	75202635	2244139	AMERICA'S FAVORITE FRIES	TARR	LIVE
140	75195469		AMERICA'S FAVORITE NAPKIN	TARR	DEAD
141	75190061		STEAK-N-BAKE AMERICA'S FAVORITE	TARR	DEAD
142	75188780		AMERICA'S FAVORITE BRANDS	TARR	DEAD
143	75157402		AMERICA'S FAVORITE ITALIAN ICE	TARR	DEAD
144	75149852		AMERICA'S FAVORITE NEW GROWN UP BURGER	TARR	DEAD
145	75149624		AMERICA'S FAVORITE NEW BURGER	TARR	DEAD
146	75144931	2119233	AMERICA'S FAVORITE SINCE FBI	TARR	DEAD
147	75122268		AMERICA'S FAVORITE FINGER FOOD	TARR	DEAD
148	75116367	2077329	IT'S AMERICA'S FAVORITE JELLY BEAN	TARR	LIVE
149	75095941		AMERICA'S FAVORITE TEMPORARY ADDRESS	TARR	DEAD
150	75082025		AMERICA'S FAVORITE	TARR	DEAD
[illegible]	75074790		AMERICA'S FAVORITE GAME OF CATCH	TARR	DEAD
152	75068756	2098790	AMERICA'S FAVORITE KETCHUP	TARR	LIVE
153	75056352	2054560	AMERICA'S FAVORITE FAVORS	TARR	LIVE
154	75049472		AMERICA'S FAVORITE FAST FOOD MADE C'EST GOURMET PIZZA! EXCITING!!	TARR	DEAD
155	75036522	2155994	AMERICA'S FAVORITE SOFT PRETZEL	TARR	LIVE
156	75021393		AMERICA'S FAVORITE BOOK	TARR	DEAD
157	75004939		AMERICA'S FAVORITE FUDGE STICKS	TARR	DEAD
158	75004937		AMERICA'S FAVORITE FRUIT STICKS	TARR	DEAD
159	74584436	1924317	BUMPERS AMERICA'S FAVORITE FOODS	TARR	LIVE
160	74676582	2131594	FAT FRED'S ORIGINAL SAUCE THE ORIGINAL BAR-B-Q- SAUCE FROM AMERICA'S FAVORITE AWARD WINNING RIBBER FAT FRED "IT'S ADDICTIVE"	TARR	DEAD
161	74470575	1924855	AMERICA'S FAVORITE	TARR	LIVE
162	74717523		AMERICA'S FAVORITE DELIVERY	TARR	DEAD
163	74714878		AMERICA'S FAVORITE SWEATER	TARR	DEAD
164	74710048		AMERICA'S FAVORITE REPLACEMENT WINDOW	TARR	DEAD
165	74670249	2064420	AMERICA'S ALL TIME FAVORITE CRAFTS CARDS	TARR	DEAD
166	74670248	2073042	AMERICA'S ALL TIME FAVORITE	TARR	DEAD
167	74669672	2002500	AMERICA'S ALL-TIME FAVORITE CRAFTS CARDS	TARR	DEAD
168	74571909	1936233	AMERICA'S FAVORITE MODEL ROCKETRY HEADQUARTERS	TARR	DEAD
[illegible]	74569904	1934477	AMERICA'S FAVORITE HOBBY HEADQUARTERS	TARR	DEAD
170	74560606		AMERICA'S FAVORITE GOLF STORE	TARR	DEAD
171	74556521		AMERICA'S FAVORITE DONUT STOP	TARR	DEAD
172	74548663		AMERICA'S FAVORITE SHRIMP	TARR	DEAD

173	74535299		AMERICA'S FAVORITE	TARR	DEAD
174	74534552		PUB-CLUB USA AMERICA'S FAVORITE BEER OF THE MONTH CLUB	TARR	DEAD
175	74522794	1912857	AMERICA'S FAVORITE COOKIE CONTAINER!	TARR	DEAD
[illegible]	74512277	1901570	AMERICA'S FAVORITE SPORTSMEN	TARR	DEAD
177	74490891	2063618	PLAY AMERICA'S FAVORITE PASTIME WITH AMERICA'S FAVORITE BEER	TARR	LIVE
178	74471542		AMERICA'S FAVORITE HOMESTYLE TASTE	TARR	DEAD
179	74453916	1912865	AMERICA'S FAVORITE HIGH ENERGY	TARR	DEAD
180	74450417	1858052	AMERICA'S FAVORITE STORES FOR PEOPLE WHO LOVE TO MAKE MUSIC	TARR	LIVE
181	74432405		CALIFORNIA COOKIE DIET AMERICA'S FAVORITE DIET PLAN TO LOSE WEIGHT FAST! TRY IT FOR A WEEK...YOU'LL BE AMAZED!	TARR	DEAD
182	74425376		SUNDAY COMICS STORE FEATURING AMERICA'S FAVORITE CHARACTERS	TARR	DEAD
183	74421025	1899204	AMERICA'S FAVORITE OIL CHANGE	TARR	LIVE
184	74401943		AMERICA'S FAVORITE VIDEO GAME MAGAZINE	TARR	DEAD
185	74400477		AMERICA'S FAVORITE CHRISTIAN SOURCE	TARR	DEAD
186	74391445		AMERICA'S FAVORITE VIDEO GAME MAGAZINES	TARR	DEAD
187	74389085	1810310	AMERICA'S FAVORITE MUSIC	TARR	DEAD
188	74380789		AMERICA'S FAVORITE HOME RECIPES	TARR	DEAD
189	74378772		AMERICA'S FAVORITE SANDWICH ALL NATURAL PEANUT BUTTER & JELLY	TARR	DEAD
190	74378602	1817597	AMERICA'S FAVORITE	TARR	LIVE
191	74359093	1791096	AMERICA'S FAVORITE	TARR	LIVE
192	74352032	1787705	AMERICA'S FAVORITE FOODS	TARR	DEAD
[illegible]	74345432	1841576	AMERICA'S FAVORITE TUNES	TARR	DEAD
[illegible]	74322961	1837304	AMERICA'S FAVORITE HOLIDAY CANDY	TARR	LIVE
195	74303965	1870501	AMERICA'S FAVORITE KITCHENS	TARR	DEAD
196	74270458	1791773	AMERICA'S FAVORITE PIZZA FEAST	TARR	DEAD
197	74265149		AMERICA'S FAVORITE ANTI-THEFT DEVICE	TARR	DEAD
198	74241703		AMERICA'S FAVORITE SINCE 1866	TARR	DEAD
199	74223412	1777517	AMERICA'S FAVORITE MUSHROOM	TARR	LIVE
200	74218417		AMERICA'S FAVORITE ANTI-THEFT DEVICE	TARR	DEAD

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Current Search: S1: (americas)[BI] and (favorite)[BI] docs: 249 occ: 1060

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
101	75737524		AMERICA'S FAVORITE COUPON BOOK	TARR	DEAD
102	75737426		AMERICA'S FAVORITE COUPON BOOK	TARR	DEAD
103	75710966		AMERICA'S FAVORITE BURGER	TARR	DEAD
104	75710962		AMERICA'S FAVORITE BURGER	TARR	DEAD
105	75697739		AMERICA'S FAVORITE SHRIMP	TARR	DEAD
106	75692204	2367259	AMERICA'S FAVORITE ON-LINE SHRINK	TARR	LIVE
107	75692203		AMERICA'S FAVORITE ON-LINE SHRINK	TARR	DEAD
108	75658312	2520689	AMERICA'S FAVORITE WAY TO PAY	TARR	LIVE
109	75649169		AIR JAMAICA, AMERICA'S FAVORITE VACATION AIRLINE	TARR	DEAD
110	75627265		TRY-FOODS AMERICA'S FAVORITE RECIPES	TARR	DEAD
111	75618178	2419870	TUMARO'S GOURMET TORTILLAS -- AMERICA'SFAVORITE	TARR	LIVE
112	75606188	2390933	TEMO SUNROOMS "AMERICA'S FAVORITE ENVIRONMENT"	TARR	LIVE
113	75596149		AMERICA'S FAVORITE THRILLS	TARR	DEAD
114	75580858		AMERICA'S FAVORITE	TARR	DEAD
115	75571858		AMERICA'S FAVORITE	TARR	DEAD
116	75563451	2315085	CHICKEN AMERICA'S FAVORITE	TARR	LIVE
117	75563450	2308087	CHICKEN AMERICA'S FAVORITE	TARR	LIVE
118	75547200	2306720	AMERICA'S FAVORITE BUSINESS GIFTS	TARR	LIVE
119	75535497	2392406	AMERICA'S FAVORITE KARTING STORE!	TARR	LIVE
120	75512852	2331109	MISTER SPARKY AMERICA'S FAVORITE ELECTRICIAN	TARR	LIVE
121	75501805	2299622	AMERICA'S FAVORITE FOODS PRESTO	TARR	LIVE
122	75486885		AMERICA'S FAVORITE PHONE CARD	TARR	DEAD
123	75470400	2359173	AMERICA'S FAVORITE CANDIES	TARR	LIVE
124	75466437		AMERICA'S #1 FAVORITE JERKY	TARR	DEAD
125	75461137		AMERICA'S FAVORITE DRIVE-THRU	TARR	DEAD
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179	74453916	1912865	AMERICA'S FAVORITE HIGH ENERGY	TARR	DEAD
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182	74425376		SUNDAY COMICS STORE FEATURING AMERICA'S FAVORITE CHARACTERS	TARR	DEAD
183	74421025	1899204	AMERICA'S FAVORITE OIL CHANGE	TARR	LIVE
184	74401943		AMERICA'S FAVORITE VIDEO GAME MAGAZINE	TARR	DEAD
185	74400477		AMERICA'S FAVORITE CHRISTIAN SOURCE	TARR	DEAD
186	74391445		AMERICA'S FAVORITE VIDEO GAME MAGAZINES	TARR	DEAD
187	74389085	1810310	AMERICA'S FAVORITE MUSIC	TARR	DEAD
188	74380789		AMERICA'S FAVORITE HOME RECIPES	TARR	DEAD
189	74378772		AMERICA'S FAVORITE SANDWICH ALL NATURAL PEANUT BUTTER & JELLY	TARR	DEAD
190	74378602	1817597	AMERICA'S FAVORITE	TARR	LIVE
191	74359093	1791096	AMERICA'S FAVORITE	TARR	LIVE
192	74352032	1787705	AMERICA'S FAVORITE FOODS	TARR	DEAD
1	74345432	1841576	AMERICA'S FAVORITE TUNES	TARR	DEAD
1	74322961	1837304	AMERICA'S FAVORITE HOLIDAY CANDY	TARR	LIVE
195	74303965	1870501	AMERICA'S FAVORITE KITCHENS	TARR	DEAD
196	74270458	1791773	AMERICA'S FAVORITE PIZZA FEAST	TARR	DEAD
197	74265149		AMERICA'S FAVORITE ANTI-THEFT DEVICE	TARR	DEAD
198	74241703		AMERICA'S FAVORITE SINCE 1866	TARR	DEAD
199	74223412	1777517	AMERICA'S FAVORITE MUSHROOM	TARR	LIVE
200	74218417		AMERICA'S FAVORITE ANTI-THEFT DEVICE	TARR	DEAD

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Current Search: S1: (americas)[BI] and (favorite)[BI] docs: 249 occ: 1060

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
201	74214903	1773945	AMERICA'S FAVORITE SANDWICH PLACE	TARR	DEAD
202	74194300	1788897	AMERICA'S FAVORITE NATURAL LOOK	TARR	DEAD
203	74177139		AMERICA'S FAVORITE MEAT SNACKS	TARR	DEAD
204	74149801		AMERICA'S FAVORITE WATCH	TARR	DEAD
205	74143458	1668714	AMERICA'S FAVORITE MUSTARD	TARR	DEAD
206	74127742	1706042	AMERICA'S FAVORITE	TARR	LIVE
207	74125163	1674342	AMERICA'S FAVORITE 25K	TARR	DEAD
208	74090605		AMERICA'S FAVORITE WAKE-UP CALL	TARR	DEAD
209	74081633		THE ORIGINAL CHICAGO DAWGS AMERICA'S FAVORITE HOT DOGS	TARR	DEAD
210	74069309	1669031	AMERICA'S FAVORITE SWIMGEAR	TARR	DEAD
211	74060450	1673418	NATIONAL EXAMINER AMERICA'S FAVORITE FAMILY WEEKLY	TARR	DEAD
212	74057117	1726762	AMERICA'S FAVORITE SKINLESS CHICKEN SINCE 1981	TARR	DEAD
213	74048546		AMERICA'S FAVORITE TOY STORE	TARR	DEAD
214	74044195	1638019	AMERICA'S SNACK FAVORITE	TARR	LIVE
215	74025885		AMERICA'S FAVORITE FROZEN YOGURT	TARR	DEAD
216	74009804		AMERICA'S FAVORITE CHRISTMAS SPECIALTY STORES	TARR	DEAD
217	73064098	1035107	FROM OUR SELECTION OF AMERICA'S FAVORITE COOKIES	TARR	DEAD
218	73833532	1601596	AMERICA'S FAVORITE NEIGHBOR	TARR	LIVE
219	73820561	1624014	AMERICA'S FAVORITE VACATION LIFESTYLE	TARR	LIVE
220	73817956		STRICTLY TO-GO DELIVERS AMERICAS' FAVORITE FOODS	TARR	DEAD
221	73814581	1604190	IT'S AMERICA'S FAVORITE JELLY BEAN.	TARR	DEAD
222	73796356	1680629	USA AMERICA'S FAVORITE CABLE NETWORK	TARR	DEAD
223	73784609	1605872	AMERICA'S FAVORITE MAIL	TARR	LIVE
224	73777389	1567544	AMERICA'S FAVORITE TUNE	TARR	DEAD
225	73765509		AMERICA'S SNACK FAVORITE	TARR	DEAD
226	73718650		AMERICA'S FAVORITE GAME PRESIDENTIAL PURSUIT	TARR	DEAD

227	73684348		THERMAL-SEAL AMERICA'S FAVORITE VINYL REPLACEMENT WINDOW]	TARR	DEAD
228	73659860	1500822	AMERICA'S FAVORITE PAGEANTS	TARR	DEAD
2[illegible]	73659859	1498067	AMERICA'S FAVORITE PRE-TEEN	TARR	DEAD
2[illegible]	73615121		AMERICA'S FAVORITE CHEESECAKE	TARR	DEAD
231	73610937	1500694	AMERICA'S FAVORITE CHEESECAKE	TARR	DEAD
232	73599242	1410981	AMERICA'S FAVORITE FOOD STORE	TARR	DEAD
233	73588302		AMERICA'S FAVORITE BOOK SELLER	TARR	DEAD
234	73502051	1379607	AMERICA'S FAVORITE CRUISE LINE	TARR	DEAD
235	73499363		AMERICA'S FAVORITE BOOK CLUB	TARR	DEAD
236	73494210		AMERICA'S FAVORITE DONUTS	TARR	DEAD
237	73466820	1352928	AMERICA'S FAVORITE NATURAL LOOK	TARR	DEAD
238	73452717	1296164	COFFEE CONNOISSEUR AMERICA'S FAVORITE BEVERAGE NEWSLETTER	TARR	DEAD
239	73413722	1296999	"AMERICA'S FAVORITE BOAT RIDE"	TARR	LIVE
240	73368527	1256452	AMERICA'S FAVORITE FUND RAISING PRODUCTS CO.	TARR	LIVE
241	73340144	1227143	AMERICA'S FAVORITE WAY TO FLY	TARR	DEAD
242	73313376		AMERICA'S FAVORITE CRUISE LINE	TARR	DEAD
243	73195016	1161514	AMERICA'S FAVORITE BOOK SELLER	TARR	DEAD
244	73190462	1179571	AMERICA'S FAVORITE DRIVE-IN SONIC	TARR	DEAD
245	73182832	1148297	IN TRIBUTE TO AMERICA'S FAVORITE TAKE-ALONG MEAL - FRIED CHICKEN	TARR	DEAD
246	73016534	1035427	AMERICA'S FAVORITE GAME OF CATCH	TARR	DEAD
247	72177222	0782607	AMERICA'S FAVORITE NUTS	TARR	DEAD
[illegible]	71606044	0560491	OLYMPIC AMERICA'S FAVORITE TELEVISION	TARR	DEAD
249	71278704	0260529	FIVE-O AMERICA'S FAVORITE CHOCOLATE BEVERAGE, 50	TARR	DEAD

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Exhibit 9

Int. Cl.: 35

Prior U.S. Cls.: 100, 101 and 102

United States Patent and Trademark Office

Reg. No. 3,055,071

Registered Jan. 31, 2006

SERVICE MARK
PRINCIPAL REGISTER

FAVORITE TRADE

DROBNY GLOBAL CONFERENCES, LLC (DELAWARE LTD LIAB CO)
206 44TH STREET
MANHATTAN BEACH, CA 90401

FOR: ARRANGING FOR AND CONDUCTING BUSINESS CONFERENCES FOR A MEMBERSHIP GROUP OF GLOBAL ASSET MANAGERS AND INSTITUTIONAL INVESTORS IN REGARD TO GLOBAL STRATEGY FOR INVESTING, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 4-0-2002; IN COMMERCE 4-0-2002.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 78-565,620, FILED 2-11-2005.

GRETTA YAO, EXAMINING ATTORNEY

Int. Cl.: 16

Prior U.S. Cls.: 2, 5, 22, 23, 29, 37, 38 and 50

United States Patent and Trademark Office

Reg. No. 2,901,133

Registered Nov. 9, 2004

TRADEMARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE SHOPPING NEWS

CREATIVE MEDIA GROUP, INC. (NORTH CAROLINA CORPORATION)
POST OFFICE BOX 2013
MONROE, NC 28111

FOR: NEWSPAPER FEATURING ADVERTISEMENTS FOR THE SALE AND PROMOTION OF MERCHANDISE AND SERVICES, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 5-31-2002; IN COMMERCE 5-31-2002.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMERICA'S" AND "SHOPPING NEWS", APART FROM THE MARK AS SHOWN.

SER. NO. 76-449,651, FILED 9-11-2002.

G. T. GLYNN, EXAMINING ATTORNEY

Int. Cl.: 35

Prior U.S. Cl.: 101

United States Patent and Trademark Office

Reg. No. 1,605,872
Registered July 10, 1990

SERVICE MARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE MAIL

VAL-PAK DIRECT MARKETING SYSTEMS, INC. (DELAWARE CORPORATION)
10601 BELCHER ROAD
LARGO, FL 34647

FOR: PROMOTING THE GOODS AND SERVICES OF OTHERS BY DESIGNING AND DISTRIBUTING PUBLICATIONS HAVING THE ADVERTISING MATERIALS OF OTHERS, IN CLASS 35 (U.S. CL. 101).

FIRST USE 8-0-1985; IN COMMERCE 8-0-1985.

SER. NO. 73-784,609, FILED 3-6-1989.

MARY I. SPARROW, EXAMINING ATTORNEY

Int. Cl.: 36

Prior U.S. Cls.: 100, 101 and 102

United States Patent and Trademark Office

Reg. No. 1,624,014
Registered Nov. 20, 1990

SERVICE MARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE VACATION LIFESTYLE

CONDOTELS OF AMERICA, INC. (SOUTH CAROLINA CORPORATION)
P.O. BOX 3196
2703 S. HIGHWAY 17
NORTH MYRTLE BEACH, SC 29582

FOR: CONDOMINIUM LEASING AND MANAGEMENT SERVICES, IN CLASS 36 (U.S. CLS. 100, 101 AND 102).

FIRST USE 10-6-1988; IN COMMERCE 10-6-1988.

SER. NO. 73-820,561, FILED 8-21-1989.

G. MAYERSCHOFF, EXAMINING ATTORNEY

Int. Cl.: 42

Prior U.S. Cl.: 100

United States Patent and Trademark Office

Reg. No. 1,601,596
Registered June 12, 1990

SERVICE MARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE NEIGHBOR

APPLEBEE'S INTERNATIONAL, INC. (DELAWARE CORPORATION)
TWO PERSHING SQUARE, SUITE 900
2300 MAIN STREET
KANSAS CITY, MO 64108

FOR: RESTAURANT AND CARRYOUT SERVICES, IN CLASS 42 (U.S. CL. 100).

FIRST USE 7-17-1989; IN COMMERCE 7-17-1989.

SER. NO. 73-833,532, FILED 10-24-1989.

G. MAYERSCHOFF, EXAMINING ATTORNEY

Int. Cl.: 42

Prior U.S. Cl.: 101

United States Patent and Trademark Office

Reg. No. 1,858,052
Registered Oct. 11, 1994

SERVICE MARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE STORES FOR PEOPLE WHO LOVE TO MAKE MUSIC

PAUL A. SCHMITT MUSIC COMPANY (MINNESOTA CORPORATION)
88 SOUTH TENTH STREET
MINNEAPOLIS, MN 55403

FOR: RETAIL MUSIC STORE SERVICES, IN CLASS 42 (U.S. CL. 101).

FIRST USE 3-0-1993; IN COMMERCE 3-0-1993.

SER. NO. 74-450,417, FILED 10-25-1993.

GERALD C. SEEGARS, EXAMINING ATTORNEY

Int. Cl.: 37

Prior U.S. Cls.: 100, 103 and 106

United States Patent and Trademark Office

Reg. No. 2,506,337
Registered Nov. 13, 2001

SERVICE MARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE REPLACEMENT WINDOW

APPLEBY SYSTEMS, INC. (PENNSYLVANIA CORPORATION)
1800 TROLLEY ROAD
YORK, PA 17404

FOR: WINDOW INSTALLATION SERVICES, IN CLASS 37 (U.S. CLS. 100, 103 AND 106).

FIRST USE 3-12-1995; IN COMMERCE 3-12-1995.

SER. NO. 76-153,049, FILED 10-25-2000.

DARLENE BULLOCK, EXAMINING ATTORNEY

Int. Cl.: 42

Prior U.S. Cls.: 100 and 101

Reg. No. 2,520,689

United States Patent and Trademark Office

Registered Dec. 18, 2001

SERVICE MARK
PRINCIPAL REGISTER

AMERICA'S FAVORITE WAY TO PAY

CHECK PAYMENT SYSTEMS ASSOCIATION, INC. (NEW YORK NOT-FOR-PROFIT CORPORATION)
1200 19TH STREET, N.W., SUITE 300
WASHINGTON, DC 20036

FOR: ASSOCIATION SERVICES, NAMELY PROMOTING THE INTERESTS OF THE PAPER CHECK INDUSTRY, IN CLASS 42 (U.S. CLS. 100 AND 101).

FIRST USE 9-0-2000; IN COMMERCE 9-0-2000.

SN 75-658,312, FILED 3-11-1999.

MARC LEIPZIG, EXAMINING ATTORNEY

Int. Cl.: 30

Prior U.S. Cl.: 46

Reg. No. 2,348,409

United States Patent and Trademark Office

Registered May 9, 2000

TRADEMARK
PRINCIPAL REGISTER

EVERYBODY'S FAVORITE SANDWICH

PRIDE OF IOWA LTD. (IOWA CORPORATION)
2273 HIGHWAY 6 TRAIL
MARENGO, IA 52301

FOR: PREPARED SANDWICHES FOR CONSUMPTION ON AND OFF PREMISE, IN CLASS 30 (U.S. CL. 46).

FIRST USE 2-24-1999; IN COMMERCE 2-24-1999.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SANDWICH", APART FROM THE MARK AS SHOWN.

SER. NO. 75-651,184, FILED 3-2-1999.

ROBERT LORENZO, EXAMINING ATTORNEY

Exhibit 10

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2006-03-06 13:12:04 ET

Serial Number: 76497489 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark (words only): AMERICA'S FAVORITE PASTA

Standard Character claim: No

Current Status: Further action on the application has been suspended.

Date of Status: 2005-09-06

Filing Date: 2003-03-14

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 107

Attorney Assigned:
HAYASH SUSAN C Employee Location

Current Location: L7D -TMEG Law Office 107 - Docket Clerk

Date In Location: 2005-10-01

LAST APPLICANT(S)/OWNER(S) OF RECORD

---

1. American Italian Pasta Company

Address:
American Italian Pasta Company
4100 N. Mulberry Drive, Suite 200
Kansas City, MO 641161696
United States
Legal Entity Type: Corporation
State or Country of Incorporation: Missouri

GOODS AND/OR SERVICES

International Class: 030
PASTA
First Use Date: 1997-09-00
First Use in Commerce Date: 1997-09-00

Basis: 1(a)

ADDITIONAL INFORMATION

Disclaimer: PASTA

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2005-09-06 - Report Completed Suspension Check Case Still Suspended

2005-03-03 - Report Completed Suspension Check Case Still Suspended

2004-10-19 - Case file assigned to examining attorney

2004-09-07 - Case file assigned to examining attorney

2004-09-03 - Report Completed Suspension Check Case Still Suspended

2004-03-25 - Letter of suspension mailed

2004-03-01 - Communication received from applicant

2004-03-01 - PAPER RECEIVED

2003-09-03 - Non-final action mailed

2003-09-03 - Case file assigned to examining attorney

CORRESPONDENCE INFORMATION

Correspondent
Thomas H. Van Hoozer (Attorney of record)

THOMAS H. VAN HOOZER
HOVEY WILLIAMS LLP
2405 GRAND BOULEVARD, SUITE 400

KANSAS CITY, MISSOURI 64108

Phone Number: 816-474-9050
Fax Number: 816-474-9057

Exhibit 11

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2006-03-06 13:12:26 ET

Serial Number: 76497190 Assignment Information

Registration Number: (NOT AVAILABLE)

Mark

(words only): AMERICA'S FAVORITE PASTA

Standard Character claim: No

Current Status: Further action on the application has been suspended.

Date of Status: 2006-03-01

Filing Date: 2003-03-14

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 101

Attorney Assigned:
LORENZO GEORGE M Employee Location

Current Location: L1X -TMEG Law Office 101 - Examining Attorney Assigned

Date In Location: 2005-05-16

LAST APPLICANT(S)/OWNER(S) OF RECORD

---

1. American Italian Pasta Company

Address:
American Italian Pasta Company
4100 N. Mulberry Drive, Suite 200
Kansas City, MO 641161696
United States
Legal Entity Type: Corporation
State or Country of Incorporation: Missouri

GOODS AND/OR SERVICES

International Class: 030
PASTA
First Use Date: 2002-05-00
First Use in Commerce Date: 2002-05-00

Basis: 1(a)

ADDITIONAL INFORMATION

Disclaimer: PASTA

Section 2(f), in part, as to "AMERICA'S FAVORITE PASTA"

Design Search Code(s):
01.01.03 - Comets; Stars with five points
01.01.10 - Stars, three or more; Three or more stars
24.09.05 - American flags; Flags, American
26.11.21 - Rectangles that are completely or partially shaded
26.17.05 - Bands, horizontal; Bars, horizontal; Horizontal line(s), band(s) or bar(s); Lines, horizontal

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2006-03-01 - Report Completed Suspension Check Case Still Suspended

2005-08-25 - Report Completed Suspension Check Case Still Suspended

2005-02-25 - Report Completed Suspension Check Case Still Suspended

2004-08-25 - Report Completed Suspension Check Case Still Suspended

2004-03-22 - Letter of suspension mailed

2004-03-01 - Communication received from applicant

2004-03-01 - PAPER RECEIVED

2003-09-03 - Non-final action mailed

2003-09-02 - Case file assigned to examining attorney

CORRESPONDENCE INFORMATION

Correspondent
Thomas H. Van Hoozer (Attorney of record)

THOMAS H. VAN HOOZER
HOVEY WILLIAMS LLP
2405 GRAND BOULEVARD, SUITE 400
KANSAS CITY, MISSOURI 64108

Phone Number: 816-474-9050
Fax Number: 816-474-9057

Exhibit 12

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

American Italian Pasta Company, Plaintiff v. New World Pasta Company, Defendant.	)	02-0594-CV-W-SOW

ANSWER AND COUNTERCLAIM OF NEW WORLD PASTA COMPANY

For its answer and counterclaim to the complaint of American Italian Pasta Company ("AIPC"), New World Pasta Company ("New World Pasta") alleges:

FIRST DEFENSE

1. New World Pasta admits the allegations of ¶ 1.

2. New World Pasta admits the allegations of ¶ 2.

3. New World Pasta admits that AIPC filed this action pursuant to 28 U.S.C. § 2201(a). New World Pasta alleges that AIPC's use of the advertising claim "America's Favorite Pasta" on its Mueller's branded dried pasta is literally false. AIPC's Mueller's advertising claim falsely conveys to consumers that Mueller's is a national brand of pasta, and is the number one selling pasta in the country. Consumers expect that AIPC has factual support for its Mueller's claim. Not only is the advertising claim "America's Favorite Pasta" on Mueller's branded dried pasta false, false, but AIPC also knows the statement to be false. According to AIPC's website, Mueller's is not sold at all anywhere

West of the Mississippi River, and is, at best, the second largest pasta brand in the United States. Except as alleged, New World Pasta denies the allegations of ¶ 3.

4. New World Pasta admits the allegations of ¶ 4.

5. New World Pasta admits the allegations of ¶ 5.

6. New World Pasta admits and alleges that AIPC's use of the advertising claim "America's Favorite Pasta" on its Mueller's branded dried pasta is a false representation of fact that misrepresents the nature, characteristics, and/or qualities of the Mueller's product in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the unfair competition laws of many states where AIPC sells Mueller's Pasta. On May 21, 2002, New World Pasta demanded that AIPC assure New World Pasta in writing no later than May 29, 2002 that by June 5, 2002, AIPC would cease all use of the claim "America's Favorite Pasta" for Mueller's products in any manner other than for product packaging, and that by July 2, 2002, AIPC would cease the production or shipping of any product, label or case packaging which displays, uses or includes the false claim "America's Favorite Pasta." On May 31, 2002, AIPC wrote to New World Pasta that it would respond to New World Pasta's demand by June 24, 2002. On June 4, 2002, New World Pasta wrote to AIPC and gave an extension until June 24, 2002 to respond. AIPC's response was to file this lawsuit. Except as alleged, New World Pasta denies the allegations of ¶ 6.

7. New World Pasta alleges that AIPC's predecessor used the advertising claim "America' s Favorite Pasta" on Mueller's branded dried pasta before the brand was sold to AIPC. At the time that AIPC's predecessor used this advertising claim, Mueller's was the number one selling dried pasta brand in the United States. At or about the time

that AIPC purchased the Mueller's brand, in the year 2000, Mueller's was no longer the number one selling brand of dried pasta in the United States. Nevertheless, despite knowing that Mueller's is not the number one selling dried pasta brand in the United States, AIPC continued and continues to use the false advertising claim, deceiving consumers and damaging its competitors. New World Pasta is without knowledge or information sufficient to form a belief as to the allegation that "AIPC and its predecessors in interest in the Mueller's name and trademark have made and sold pasta products for about 130 years." Except as alleged, New World Pasta denies the allegations of ¶ 7.

8. New World Pasta denies the allegations of ¶ 8 and alleges that the advertising claim "America's Favorite Pasta" used on and in connection with AIPC's sales of Mueller's branded dried pasta products is a false representation of fact that misrepresents the nature, characteristics, and/or qualities of the Mueller's product in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the unfair competition laws of many states where AIPC sells Mueller's Pasta. New World Pasta alleges that the claims and contentions of ¶ 8 are without evidentiary support and are not warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law.

9. New World Pasta denies the allegations of ¶ 9 and alleges that on May 21, 2002, New World Pasta's General Counsel wrote to AIPC's President and Chief Operating Officer:

> We understand that AIPC continues to use the claim "American's Favorite Pasta" in connection with the sale of Mueller's pasta products. According to current IRI data, the claim is false and violates §43(a) of the Lanham Act and many state unfair competition laws.

> We ask you to assure us in writing, not later than the close of business on Friday, May 24, 2002, that AIPC will: i) by May 31, 2002, cease all use of the claim "America's Favorite Pasta" ("Prohibited Claim") for Mueller's products, in any manner other than for product packaging, including but not limited to the cessation of the use of the Prohibited Claim in or on advertising, FSI's, promotions, websites, sales or broker communications or customer communications; and ii) by July 1, 2002, cease the production or shipping of any product, label or case packaging which displays, uses or includes the Prohibited Claim.
>
> If you are prepared and willing to make the requested changes, please call me by the time and date indicated.

10. New World Pasta denies the allegations of ¶ 10 and alleges that the advertising claim "America's Favorite Pasta" on Mueller's branded dried pasta is a false representation of fact that misrepresents the nature, characteristics, and/or qualities of the Mueller's product in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the unfair competition laws of many states where AIPC sells Mueller's Pasta.

11. New World Pasta admits that AIPC has filed an action seeking declaratory relief. Except as admitted, New World Pasta denies the allegations of ¶ 11.

SECOND DEFENSE

12. AIPC's complaint fails to state a claim for which relief can be granted.

THIRD DEFENSE

13. AIPC's complaint is an exceptional case under 15 U.S.C. § 1117 in that AIPC's claims are groundless and unreasonable, vexatious and in bad faith, justifying an award of attorney fees and all expenses related to this litigation to New World Pasta.

WHEREFORE, defendant New World Pasta prays:

1. For a judgment dismissing AIPC's complaint with prejudice;

2. For its costs of suit;

3. For an express finding that this case is "exceptional" under 15 U.S.C. § 1117, and an award to New World Pasta of its attorney fees and all costs and expenses resulting from AIPC's pursuit of a groundless, unreasonable, vexatious, and/or bad faith claim.

4. For such other relief as the Court considers to be just.

COUNTERCLAIM

For its counterclaim against AIPC, New World Pasta alleges:

NATURE OF THE ACTION

1. This counterclaim challenges AIPC's use of the advertising claim "America's Favorite Pasta" on its Mueller's branded dried pasta. The advertising claim is literally false. AIPC's Mueller's advertising claim falsely conveys to consumers that Mueller's is a national brand of pasta, and is the number one selling pasta in the country. Consumers expect that AIPC has factual support for its Mueller's claim. Not only is the advertising claim "America's Favorite Pasta" on Mueller's branded dried pasta false, but AIPC also knows the statement to be false. According to AIPC's website, Mueller's is not sold at all anywhere West of the Mississippi River, and is, at best, the second largest pasta brand in the United States. AIPC's false advertising confuses consumers, harms New World Pasta, AIPC's competitor, and violates federal and state law. New World Pasta seeks preliminary and permanent injunctive relief prohibiting AIPC from using the advertising claim "America's Favorite Pasta" on or in connection with sales of its Mueller's branded dried pasta. New World Pasta also seeks damages, including a recovery of an equitable portion of AIPC's profits, and requests that its damages be

trebled. New World Pasta also seeks an award of attorney fees under 15 U.S.C. § 1117 and applicable state laws.

JURISDICTION AND VENUE

2. Subject matter jurisdiction exists under 28 U.S.C. § 1338 and 1331 to remedy defendants' violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125, and under principles of pendent jurisdiction. New World Pasta's counterclaim is compulsory under Federal Rule of Civil Procedure 13(a).

3. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and 1391(c).

THE PARTIES

4. New World Pasta is a Delaware corporation with its principal place of business at 85 Shannon Road, Harrisburg, PA 17112. New World Pasta manufactures dry pasta products under the American Beauty, Ronzoni, San Giorgio, Creamette, Prince, and Skinner brands, which it sells throughout the United States. New World Pasta is the number one branded pasta manufacturer in the United States, and sells its products in all 50 states.

5. AIPC is a Delaware corporation with its principal place of business at 4100 North Mulberry Drive, Kansas City, MO 64116. AIPC sells Mueller's brand dry pasta in some but not all states East of the Mississippi River. According to AIPC's web site, "Mueller's is the 2nd largest pasta brand in the United States" and is not available in large sections of the United States, including many of the Eastern States (*See* Exhibit A).

AIPC'S FALSE ADVERTISING

6. AIPC purchased the Mueller's brand and trademark from Best Foods on or about November 14, 2000. For some period of time prior to November 2000, while Best

Foods owned the Mueller's brand and trademark, and used the advertising claim "American's Favorite Pasta," Mueller's was the number one branded dry pasta in the United States.

7. By the time that AIPC purchased the Mueller's brand and trademark for dry pasta products, Mueller's was no longer the number one branded dry past in the United States. Nevertheless, AIPC continued and continues to use the false advertising claim "America's Favorite Pasta" on all Mueller's pasta packaging and in connection with the sale of Mueller's dry pasta.

8. The advertising claim "America's Favorite Pasta" is literally false because Mueller's is not America's leading brand of dried pasta. According to AIPC's website, Mueller's is not sold at all anywhere West of the Mississippi River, and is, at best, the second largest pasta brand in the United States.

9. AIPC's advertising claim "America's Favorite Pasta" falsely conveys to consumers that Mueller's is a national brand of pasta, and is the number one selling pasta in the country. Consumers expect that AIPC has factual support for its Mueller's claim. Not only is AIPC's Mueller's advertising claim false, but AIPC also knows the statement to be false. The advertising claim is false. According to AIPC's website, Mueller's is not sold at all anywhere West of the Mississippi River, and is, at best, the second largest pasta brand in the United States.

AIPC'S WILFULLNESS

10. AIPC is aware that Mueller's is not a national brand of pasta and is not the number one selling pasta in the country. According to AIPC's web site, Mueller's is at

best the second largest pasta brand in the United States. Also according to the website, Mueller's is not sold in many areas of the United States East of the Mississippi.

FIRST CLAIM

11. New World Pasta realleges ¶ 1 through ¶ 10.

12. AIPC's statement "America's Favorite Pasta" on packages of Mueller's branded dried pasta, and used in connection with sales of Mueller's branded dried pasta, is used in interstate commerce.

13. AIPC's statement "America's Favorite Pasta" on packages of Mueller's branded dried pasta, and used in connection with sales of Mueller's branded dried pasta, is a statement of commercial advertising.

14. The statement "America's Favorite Pasta" misrepresents the nature, characteristics, and/or qualities of the Mueller's dried pasta product.

15. New World Pasta sells its dried pasta products in direct competition with AIPC's Mueller's branded dried pasta, and New World Pasta has been and/or is likely to be damaged by AIPC's use of the false advertising claim "America's Favorite Pasta."

16. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's dried pasta products violates § 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a).

17. New World Pasta is entitled under 15 U.S.C. § 1117(a) to an equitable portion of New World Pasta's profits in addition to any actual damages. Such award should be enhanced to a sum not exceeding three times its amount.

18. The deception AIPC is causing with its false advertising claim "America's Favorite Pasta" on its Mueller's branded dried pasta will not be adequately remedied at law, and AIPC should be preliminarily and permanently enjoined from using the false advertising claim "America's Favorite Pasta" on or in connection with sales of its Mueller's branded dried pasta.

19. Because AIPC's use of the false advertising claim "America's Favorite Pasta" on its Mueller's branded dried pasta has been and is willful, New World Pasta should be awarded its attorneys fees and all costs associated with this litigation.

SECOND CLAIM

20. New World Pasta realleges ¶ 1 through ¶ 19.

21. AIPC has sold and sells its Mueller's branded dried pasta in the State of Connecticut.

22. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Connecticut is an unfair or deceptive act or practice in the conduct of trade or commerce that violates Connecticut General Statute § 42-110b.

23. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Connecticut has damaged New World Pasta and will continue to damage New World Pasta.

24. New World Pasta is entitled to an award of damages, costs and attorney fees and punitive damages against AIPC under Connecticut General Statute § 42-110g.

25. With the serving and filing of this Counterclaim, New World Pasta has mailed a copy of the Counterclaim to the Attorney General and the Commissioner of

Consumer Protection of the State of Connecticut as required by Connecticut General Statute § 42-110g(c).

THIRD CLAIM

26. New World Pasta realleges ¶ 1 through ¶ 19.

27. AIPC has sold and sells its Mueller's branded dried pasta in the State of Delaware.

28. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Delaware is a deceptive trade practice that violates 6 Delaware Code § 2532.

29. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Delaware has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

30. New World Pasta is entitled to an injunction, treble damages, costs and attorney fees against AIPC under 6 Delaware Code § 2533.

FOURTH CLAIM

31. New World Pasta realleges ¶ 1 through ¶ 19.

32. AIPC has sold and sells its Mueller's branded dried pasta in the State of Florida.

33. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Florida is an unfair or deceptive act or practice in the conduct of trade or commerce that violates Florida Statute § 501.204.

34. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Florida has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

35. New World Pasta is entitled to injunctive relief, damages, costs and attorney fees against AIPC under Florida Statute § 501.211.

FIFTH CLAIM

36. New World Pasta realleges ¶ 1 through ¶ 19.

37. AIPC has sold and sells its Mueller's branded dried pasta in the State of Georgia.

38. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Georgia is a deceptive trade practice that violates Georgia Statute 10-1-372.

39. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Georgia has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

40. New World Pasta is entitled to injunctive relief under Georgia Statute 10-1-373, and damages, costs and attorney fees against AIPC under Georgia Statute 10-1-399.

SIXTH CLAIM

41. New World Pasta realleges ¶ 1 through ¶ 19.

42. AIPC has sold and sells its Mueller's branded dried pasta in the State of Illinois.

43. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Illinois is an unfair or deceptive act or practice that violates Illinois Statute Chapter 815 § 505/2.

44. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Illinois has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

45. New World Pasta is entitled to injunctive relief, damages, costs and attorney fees and punitive damages against AIPC under Illinois Statute Chapter 815 § 505/10a.

46. With the serving and filing of this Counterclaim, New World Pasta has mailed a copy of the Counterclaim to the Attorney General of the State of Illinois as required by Illinois Statute Chapter 815 § 505/10a.

SEVENTH CLAIM

47. New World Pasta realleges ¶ 1 through ¶ 19.

48. AIPC has sold and sells its Mueller's branded dried pasta in the State of Louisiana.

49. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Louisiana is an unfair or deceptive act or practice in the conduct of trade or commerce that violates Louisiana Revised Statute 51:1405.

50. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Louisiana has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

51. New World Pasta is entitled to injunctive relief under Louisiana Revised Statute 51:1407, and an award of treble damages, costs and attorney fees against AIPC under Louisiana Revised Statute 51:1409.

52. With the serving and filing of this Counterclaim, New World Pasta has mailed a copy of the Counterclaim to the Attorney General and the Director of Consumer Affairs of the State of Louisiana as required by Louisiana Revised Statute 51:1409(B).

EIGHTH CLAIM

53. New World Pasta realleges ¶ 1 through ¶ 19.

54. AIPC has sold and sells its Mueller's branded dried pasta in the State of Maryland.

55. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Maryland is an unfair or deceptive trade practice that violates Maryland Code, Commercial Law, § 13-301.

56. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Maryland has damaged New World Pasta and will continue to damage New World Pasta.

57. New World Pasta is entitled to an award of damages, costs and attorney fees against AIPC under Maryland Code, Commercial Law, § 13-408.

NINTH CLAIM

58. New World Pasta realleges ¶ 1 through ¶ 19.

59. AIPC has sold and sells its Mueller's branded dried pasta in the State of Michigan.

60. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Michigan is a deceptive method, act or practice in the conduct of trade or commerce that violates Michigan Compiled Laws Chapter 445.903.

61. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Michigan has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

62. New World Pasta is entitled to an injunction and an award of damages, costs and attorney fees against AIPC under Michigan Compiled Laws Chapter 445.911.

TENTH CLAIM

63. New World Pasta realleges ¶ 1 through ¶ 19.

64. AIPC has sold and sells its Mueller's branded dried pasta in the State of New Hampshire.

65. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of New Hampshire is an unfair or deceptive act or practice that violates New Hampshire Revised Statute § 358-A:2.

66. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of New Hampshire has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

67. New World Pasta is entitled to an injunction and an award of treble damages, costs and attorney fees against AIPC under New Hampshire Revised Statute § 358-A:10.

ELEVENTH CLAIM

68. New World Pasta realleges ¶ 1 through ¶ 19.

69. AIPC has sold and sells its Mueller's branded dried pasta in the State of New Jersey.

70. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of New Jersey is a deception and misrepresentation that violates New Jersey Statute 56:8-2.

71. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of New Jersey has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

72. New World Pasta is entitled to an injunction and an award of treble damages, costs and attorney fees against AIPC under New Jersey Statute 56:8-19.

73. New World Pasta is also entitled to an award of AIPC's profits on the sale of Mueller's branded dried pasta in New Jersey under New Jersey Statutes 56:8-2.11.

TWELFTH CLAIM

74. New World Pasta realleges ¶ 1 through ¶ 19.

75. AIPC has sold and sells its Mueller's branded dried pasta in the State of New York.

76. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of New York is a deceptive act or practice that violates New York General Business Law §§ 349 and 350.

77. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of New York has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

78. New World Pasta is entitled to an injunction and an award of damages against AIPC under New York General Business Law §§ 349.

THIRTEENTH CLAIM

79. New World Pasta realleges ¶ 1 through ¶ 19.

80. AIPC has sold and sells its Mueller's branded dried pasta in the State of North Carolina.

81. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of North Carolina is an unfair or deceptive act or practice that violates North Carolina General Statute § 75-1.1.

82. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of North Carolina has damaged New World Pasta and will continue to damage New World Pasta.

83. New World Pasta is entitled to an award of treble damages, costs and attorney fees against AIPC under North Carolina General Statutes §§ 75-16 and 75-16.1.

FOURTEENTH CLAIM

84. New World Pasta realleges ¶ 1 through ¶ 19.

85. AIPC has sold and sells its Mueller's branded dried pasta in the State of Ohio.

86. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Ohio is a deceptive trade practice that violates Ohio Revised Code § 4165.02.

87. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Ohio has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

88. New World Pasta is entitled to an injunction and an award of damages, costs and attorney fees against AIPC under Ohio Revised Code § 4165.03.

FIFTEENTH CLAIM

89. New World Pasta realleges ¶ 1 through ¶ 19.

90. AIPC has sold and sells its Mueller's branded dried pasta in the State of South Carolina.

91. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of South Carolina is a deceptive act or practice that violates South Carolina Statute § 39-5-20.

92. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of South Carolina has damaged New World Pasta and will continue to damage New World Pasta.

93. New World Pasta is entitled to an award of treble damages, costs and attorney fees against AIPC under violates South Carolina Statute § 39-5-140.

SIXTEENTH CLAIM

94. New World Pasta realleges ¶ 1 through ¶ 19.

95. AIPC has sold and sells its Mueller's branded dried pasta in the State of Tennessee.

96. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Tennessee is a deceptive act or practice that violates Tennessee Code § 47-18-104.

97. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Tennessee has damaged New World Pasta and unless enjoined will continue to damage New World Pasta.

98. New World Pasta is entitled to an injunction and an award of treble damages, costs and attorney fees against AIPC under Tennessee Code § 47-18-109.

SEVENTEENTH CLAIM

99. New World Pasta realleges ¶ 1 through ¶ 19.

100. AIPC has sold and sells its Mueller's branded dried pasta in the State of Virginia.

101. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta is a fraudulent act or practice that violates Virginia Code § 59.1-200.

102. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Virginia has damaged New World Pasta and will continue to damage New World Pasta.

103. New World Pasta is entitled to an award of damages, treble damages, costs and attorney fees against AIPC under Virginia Code § 59.1-204.

EIGHTEENTH CLAIM

104. New World Pasta realleges ¶ 1 through ¶ 19.

105. AIPC has sold and sells its Mueller's branded dried pasta in the State of Wisconsin.

106. AIPC's use of the false advertising claim "America's Favorite Pasta" on and in connection with sales of its Mueller's branded dried pasta in the State of Wisconsin is deceptive advertising that violates Wisconsin Statute § 100.18.

107. AIPC's use of the false advertising claim "America's Favorite Pasta" on and connection with sales of its Mueller's branded dried pasta in the State of Wisconsin has damaged New World Pasta and will continue to damage New World Pasta.

108. New World Pasta is entitled to an award of damages, costs and attorney fees against AIPC under Wisconsin Statute § 100.18.

WHEREFORE, defendant New World Pasta prays:

1. For a judgment that AIPC has violated § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

2. For an express finding that this case is "exceptional" under 15 U.S.C. § 1117.

3. For a judgment that AIPC has violated Connecticut General Statute § 42-110b.

4. For a judgment that AIPC has violated 6 Delaware Code § 2532.

5. For a judgment that AIPC has violated Florida Statute § 501.204.

6. For a judgment that AIPC has violated Georgia Statute 10-1-372.

7. For a judgment that AIPC has violated Illinois Statute Chapter 815 § 505/2.

8. For a judgment that AIPC has violated Louisiana Revised Statute 51:1405.

9. For a judgment that AIPC has violated Maryland Code, Commercial Law, § 13-301.

10. For a judgment that AIPC has violated Michigan Compiled Laws Chapter 445.903.

11. For a judgment that AIPC has violated New Hampshire Revised Statute § 358-A:2.

12. For a judgment that AIPC has violated New Jersey Statute 56:8-2.

13. For a judgment that AIPC has violated New York General Business Law §§ 349 and 350.

14. For a judgment that AIPC has violated North Carolina General Statute § 75-1.1.

15. For a judgment that AIPC has violated Ohio Revised Code § 4165.02.

16. For a judgment that AIPC has violated South Carolina Statute § 39-5-20.

17. For a judgment that AIPC has violated Tennessee Code § 47-18-104.

18. For a judgment that AIPC has violated Virginia Code § 59.1-200.

19. For a judgment that AIPC has violated Wisconsin Statute § 100.18.

20. For a preliminary and permanent injunction barring AIPC from using the false advertising claim "America's Favorite Pasta" on or in connection with sales of its Mueller's branded dried pasta.

21. For damages, including an equitable portion of AIPC's profits from sales of its Mueller's branded dried pasta.

22. For trebling of all or an appropriate portion of all damages.

23. For all costs, expenses and attorney fees.

24. For such other relief as the Court considers to be appropriate.

JURY DEMAND

New World Pasta demands a trial by jury.

Dated: August 2, 2002

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Certificate of Service

I hereby certify that on August 2, 2002 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: Scott R. Brown and Robert D. Hovey of Hovey, Williams, Timmons & Collins;

And I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: none.

s/ Paula Schaefer

bags. The package design also features unique recipes for each noodle width variety.

In addition, we have introduced a new marketing campaign for Mueller's pasta that includes television and print advertising.

We intend to place increased emphasis on consumer advertising and increase promotional spending in 2002. We will also continue to seek out strategic acquisitions that complement our existing portfolio. ■

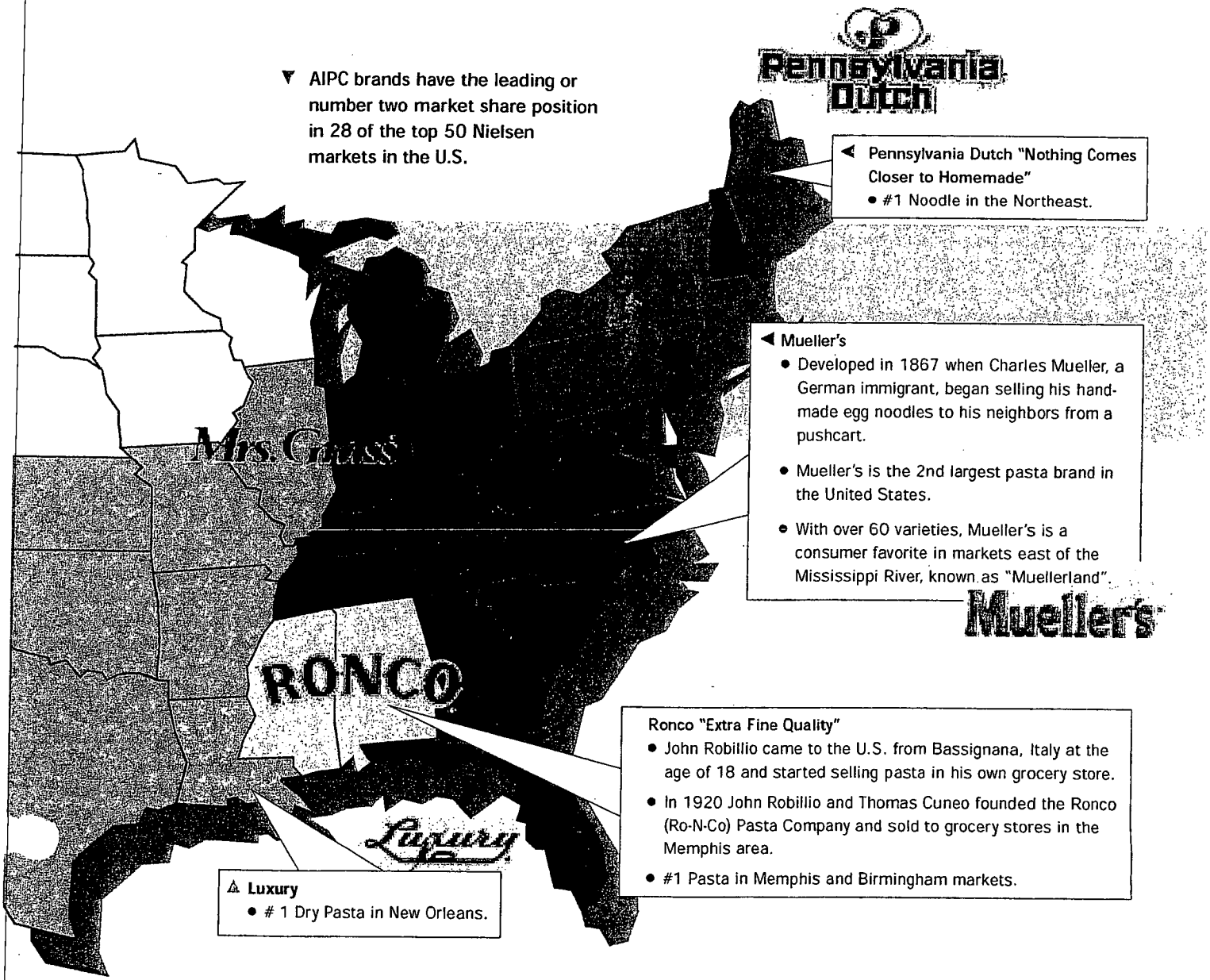
AIPC's brand acquisition strategy:

1. Acquire brands that are #1 or #2 in their respective markets (pasta brands are primarily regionally based);

2. Achieve significant synergies by integrating the brand into our low cost structure; and

3. Target brands with little or no geographic overlap with our existing brands.

▼ AIPC brands have the leading or number two market share position in 28 of the top 50 Nielsen markets in the U.S.



◀ Pennsylvania Dutch "Nothing Comes Closer to Homemade"
- #1 Noodle in the Northeast.

◀ Mueller's
- Developed in 1867 when Charles Mueller, a German immigrant, began selling his hand-made egg noodles to his neighbors from a pushcart.
- Mueller's is the 2nd largest pasta brand in the United States.
- With over 60 varieties, Mueller's is a consumer favorite in markets east of the Mississippi River, known as "Muellerland".

Ronco "Extra Fine Quality"
- John Robillio came to the U.S. from Bassignana, Italy at the age of 18 and started selling pasta in his own grocery store.
- In 1920 John Robillio and Thomas Cuneo founded the Ronco (Ro-N-Co) Pasta Company and sold to grocery stores in the Memphis area.
- #1 Pasta in Memphis and Birmingham markets.

▲ Luxury
- # 1 Dry Pasta in New Orleans.

Exhibit 13

United States Court of Appeals

for the

Eighth Circuit

Case No. 03-2065

AMERICAN ITALIAN PASTA CO.,

Plaintiff-Appellee,

–against–

NEW WORLD PASTA CO.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR PLAINTIFF-APPELLEE

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APPELLEE'S RESPONSE TO APPELLANT'S SUMMARY OF THE CASE

The use of "America's Favorite Pasta" on American Italian Pasta Company's MUELLER'S brand of dried pasta products is the proper focus of the Appeal as it was in the decision by the District Court below. New World Pasta's "Summary of The Case" merely repeats its failed contention that the use of "America's Favorite Pasta" constitutes false advertising under the Lanham Act. New World Pasta ("NWP") bases its entire case on the premise that America's Favorite Pasta translates to the consumer as "#1 in national sales." Nowhere in the Joint Appendix which is all the evidence presented to the District Court does American Italian Pasta Company ("AIPC") make the claim that MUELLER'S brand pasta is the "#1 selling pasta in America." In contrast, the evidence is clear that AIPC asserts no claim that its MUELLER'S pasta is "#1" in any category or even that it is sold in every market in the U.S.

In dismissing NWP's counterclaim, the District Court correctly analyzed the threshold issue of whether "America's Favorite Pasta" was "puffery," as a matter of law, since there are no disputed facts on how and under what circumstances the phrase is used on AIPC's packaging (ADD 1; JA 1686).

The issue of puffery was fully briefed by both the parties below. In its Summary of the Case, NWP makes no assertion that the dismissal of its counterclaim, *sua sponte*, was procedurally improper or a surprise or challenges

the District Court's dismissal of the state law claims. Instead, NWP conjures up a new legal test to determine "puffery." This "test" disposes with the practical approach to deciding "puffery" adopted by this Court and the other Circuits who have dealt with the question and would, instead, require every advertising phrase to be the subject of competing market research experts. This "test" would also ignore the language of the statute and the weight of decisional authority by proposing that expressions of general opinions should be actionable as false advertising.

The District Court properly analyzed "puffery" based upon the undisputed facts and the law in reaching its decision that the use of America's Favorite Pasta was non-actionable under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Because the finding of puffery disposed of one of the five elements of a false advertising action, New World Pasta's counterclaim was properly dismissed as a matter of law under Fed. R. Civ. P. 56. Similarly, New World Pasta's submissions failed to establish the remaining elements which would entitle it to the requested partial summary judgment on its counterclaim.

American Italian Pasta Company requests oral argument of at least fifteen (15) minutes, as well, to present to the Court the accuracy of the District Court's application of the prevailing law on the issue of false advertising in the case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1, appellee, American Italian Pasta Company, discloses that it has no parent, and that no publicly held corporation owns 10% or more of its stock.

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The following abbreviations will be used:

"AIPC" refers to plaintiff, counterdefendant, and appellee American Italian Pasta Company.

"NWP" refers to defendant, counterclaimant, and appellant New World Pasta Company.

"ADD" refers to the Addendum to AIPC's Brief.

"JA" refers to the Joint Appendix.

"NWP Br." refers to New World Pasta Company's Opening Brief.

JURISDICTIONAL STATEMENT

AIPC concurs that this Court has jurisdiction under 28 U.S.C. § 1291 from a final decision of the District Court dismissing NWP's counterclaim for alleged false advertising brought against AIPC under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). AIPC further concurs that its motion for attorneys' fees and costs brought pursuant to Fed. R. Civ. P. 54 and 15 U.S.C. § 1117(a) does not affect the finality of the District Court's opinion for purposes of this appeal.

APPELLEE'S RESPONSE TO APPELLANT'S STATEMENT OF ISSUES

AIPC views NWP's "Statement of Issues" as skewing the review of the decision of the District Court away from the facts and law which were properly considered. As AIPC understands the controlling authority, this Court may consider the following issues in affirming the decision of the District Court.

1. Do genuine issues of material fact exist which prevent the District Court from deciding the issue of the false advertising claims as a matter of law? Fed. R. Civ. P. 56; Insty*Bit v. Poly-Tech Indus., 95 F.3d 663, 667 (8th Cir. 1996), cert. denied, 519 U.S. 1151 (1997); Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service, Inc., 911 F.2d 242, 244-45 (9th Cir. 1990).

2. To determine false advertising, may the District Court at the threshold, decide whether "America's Favorite Pasta," as a matter of law, makes a false statement in a commercial advertisement about its own or another's product or is it non-actionable puffery? United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998); Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1124 (8th Cir. 1999)(adopting puffery standard set forth in Cook, Perkiss, 911 F.2d at 244-45).

3. Does the statement "America's Favorite Pasta" constitute puffery which is either "exaggerated advertising, blustering, and boasting upon which no

reasonable buyer would rely" or makes representations of opinion of product superiority which are vague or highly subjective? United Indus., 140 F.3d at 1180; Cook, Perkiss, 911 F.2d at 246.

4. Should summary judgment be granted when the claim of false advertising is asserted against a statement which no reasonable jury would conclude was anything more than "puffery?" Fed. R. Civ. P. 56; United Indus., 140 F.3d at 1180; Cook, Perkiss, 911 F.2d at 246.

APPELLEE'S RESPONSE TO APPELLANT'S STATEMENT OF THE CASE

To provide the necessary, additional information to consider the decision of the District Court, AIPC hereby responds to NWP's "Statement of the Case."

NWP and AIPC are competitors in the sale of dried pasta products which include spaghetti, macaroni and other shapes and sizes of pasta. (JA 1620-21). AIPC has been the sole manufacturer under license of Mueller's dried pasta since 1997. (JA 54, 1620). From 1997 through November of 2000, AIPC manufactured Mueller's dried pasta for Best Foods. (JA 1621). Then, on or about November 14, 2000, AIPC purchased the exclusive rights to all aspects of the MUELLER'S brand from Best Foods assuming responsibility for packaging, distribution, pricing and marketing of MUELLER'S brand pastas. (JA 54, 1621, 1894). The phrase "America's Favorite Pasta" appeared on the packaging for MUELLER'S before the brand's purchase by AIPC. (JA 1621). The use of the phrase continued after

the purchase by AIPC on packaging which was placed on product shelves next to competitive brands at the point of purchase, and in direct-to-consumer advertising. (JA 1622). The parties agree that Barilla was the largest selling brand of pasta in 2002. (JA 1894). However, AIPC is the leading producer of dry pasta in the United States, selling retail private label and retail branded products as well as to the food/service and industrial/ingredients segments of the market. (JA 1633).

It is undisputed that AIPC made no claim that its MUELLER'S brand is "#1 in sales" in any consumer advertising or on its packaging (JA 1721, 1894-95), and, AIPC makes no claim that the brand is sold in every market for pasta in the U.S. (JA 1624, 1894-95). AIPC affirmatively states that its pasta brands are regional in sales and uses a map to show where MUELLER'S pasta is primarily available (except for military commissaries). (JA 1720). Further, the MUELLER'S brand has been sold in the United States since 1867 and AIPC asserts this brand's heritage. (JA 1635-36). The MUELLER'S package states:

> [f]or over 135 years, pasta lovers have enjoyed the great taste of Mueller's. Our pasta cooks to perfect tenderness every time because it's made from 100% pure semolina milled from the highest quality durum wheat. Taste why Mueller's is America's Favorite Pasta.

(JA 1624, 1684).

In a May 21, 2002 letter, NWP claimed that use of "America's Favorite Pasta" was false advertising and demanded an assurance by May 29, 2002 that by

July 2, 2002 AIPC would cease and desist such use. (JA 335). In response, AIPC filed an action on June 20, 2002 under 28 U.S.C. § 2201 for a declaratory judgment based on the allegation that "America's Favorite Pasta" was non-actionable puffery and, as such, does not violate § 43(a) of the Lanham Act. (JA 14-16). NWP's counterclaim filed in the action alleged false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and claimed violation of seventeen (17) state laws under the respective false and deceptive trade practices statutes and common law in each state. (JA 17-39).

AIPC filed a motion under Rule 12(b)(6) to dismiss the Lanham Act claim for its failure to state a claim for false advertising under the Lanham Act. (JA 41-43). NWP followed with a cross motion for partial summary judgment on the issue of liability on its allegations of false advertising under the Lanham Act. (JA 44-47). Both motions were fully briefed, as was NWP's motion to strike evidence submitted by AIPC in opposition to NWP's motion for summary judgment under Rule 56(e), which was denied by the District Court. (JA 1891-92).

The procedural posture of the case before the District Court was AIPC's motion to dismiss on the issue of "puffery" and NWP's motion for summary judgment on "false advertising." (JA 41-43, 44-47). Both motions centered exclusively on the significance of the phrase "America's Favorite Pasta," as a matter of law, under the Lanham Act, 43(a), 15 U.S.C. § 1125(a). Id. The District

Court denied AIPC's motion to dismiss solely upon the standard of Rule 12(b)(6)(a) and clearly stated that the puffery issue would be decided on the record in the "fully briefed motion for summary judgment" brought by NWP: "While the Court could consider these facts and convert plaintiff's motion to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(b), the Court declines to do so. There is a fully briefed motion for summary judgment pending." (JA 1887-90).

Both AIPC and NWP sought to have the District Court decide the issue of "America's Favorite Pasta" under the Lanham Act as a matter of law. (JA 1893-94). There is no dispute as to the facts concerning AIPC's use of "America's Favorite Pasta" in the marketplace. The District Court considered all the evidence put before it and properly applied the law to reach its decision dismissing NWP's counterclaim and entering judgment in favor of AIPC on its prayer for declaratory relief. (JA 1893-1901).

APPELLEE'S RESPONSE TO STATEMENT OF FACTS

NWP's "Statement of Facts" in paragraphs "A. AIPC's Use of the Claim 'America's Favorite Pasta'," "B. MUELLER'S is not #1 in Sales and Is Declining and "C. MUELLER'S is Only Sold Regionally East of the Mississippi" presents no genuine issues of material fact. (NWP Br. 5-6). NWP's argumentative assertion regarding the conclusions on consumer marketing provided by its two expert

witnesses notwithstanding, there is no evidence that AIPC asserts either national sales or sales ascendancy for its MUELLER'S brand. (JA 1894-95).

Paragraph "D. Consumer Perception of the Claim 'America's Favorite Pasta'" presents selected opinions from the reports of the two experts commissioned by NWP to "prove" its case of false advertising (NWP Br. 6-8). Omitted is the criticism of the consumer perception study presented by AIPC (JA 1102-1123). Other than the reports produced by its two retained experts, NWP offered no evidence purporting to demonstrate material consumer deception caused by the use of "America's Favorite Pasta."

The District Court was presented undisputed evidence of third party uses of "America's Favorite" including the following information from an Internet search of the term "America's Favorite" in the food and beverage field: "America's Favorite Candy", "America's Favorite Chicken", "... America's Favorite Sandwich", "America's Favorite Brand Name Foods", "America's Favorite Family Restaurants", "America's Favorite Wild Game Recipes", "America's Favorite Beer and Wine Club Selections", "America's Favorite Comfort Cookbook", "growing America's favorite Vegetables", "Mahatma-America's Favorite Rice", "America's Favorite Fowl Chickens", "Apples-Nutritious and Tasty-America's Favorite Fruit Snack", "Cherry Mash: America's Favorite Cherry Flavored Candy Bar", "Saluting America's Favorite Fruit-Apples", "America's Favorite Food" (referring

to chili), "America's Favorite Hot Dogs", "America's Favorite Low Calorie, Sugar-Free Foods and Beverages", "America's Favorite Pot Roast", "Cry Baby-America's Favorite Sour Gum", "America's Favorite Cheesesteak, Steak Escape", "HotLicks-America's Favorite Hot Sauce & Fiery Food Store", "America's Favorite Quick Breads & Desserts", "America's Favorite Snacks Gift Basket", "America's Favorite Dinner Show", "America's Favorite Brand Name Light Cooking", "America's Favorite Fresh Salsa", "America's Favorite Treat" (referring to ice cream), "America's Favorite: Apple Pie", "America's Favorite Pork Chops", "America's Favorite Beef Recipes", "America's Favorite Pie Plant", "America's Favorite Root." (JA 1129-32). There are no genuine issues of material fact relating to the record of subjective nature third party uses of "America's Favorite."

The District Court was further provided with undisputed evidence that the United States Patent and Trademark Office permits the registration of marks which include "America's Favorite...." (JA 1294-1618). The U.S.P.T.O. views the phrase "America's Favorite..." to be "laudatory;" therefore, the Office requires proof of acquired distinctiveness. See, e.g., In re Boston Beer Company, 198 F.3d 1370, 1373 (Fed. Cir. 1999); In re Wileswood, Inc., 201 U.S.P.Q. 400 (T.T.A.B. 1978)(America's Favorite Popcorn amounted "to nothing more than trade puffery

or self laudatory expressions of applicant's product and would be so understood"). (ADD 13-15).

The following trademarks which are registered or pending in the United States Patent and Trademark Office incorporate the phrase "America's Favorite ...": AMERICA'S FAVORITE FEAST (Reg. No. 2,639,844); AMERICA'S FAVORITE DOWN PAYMENT GIFT PROGRAM (Ser. No. 78/092,948); BARILLA-AMERICA'S FAVORITE PASTA (Ser. No. 78/136,703); AMERICA'S FAVORITE (Ser. No. 78/075,143); AMERICA'S FAVORITE COOKIE (Reg. No. 2,572,410); AMERICA'S FAVORITE PIZZA FEAST (Reg. No. 2,558,945); AMERICA'S FAVORITE SNACK CAKE (Reg. No. 2,641,675); AMERICA'S FAVORITE SHOPPING NEWS (Ser. No. 76/449,651); AMERICA'S FAVORITE MARKET PLACE (Ser. No. 76/440,765); TUMARO'S AMERICA'S FAVORITE GOURMET TORTILLA (Ser. No. 76/302,605); AMERICA'S FAVORITE CHEESESTEAKS STEAK ESCAPE (Reg. No. 2,604,337); AMERICA'S FAVORITE MATTRESS (Ser. No. 76/388,158); AMERICA'S FAVORITE FLAVORS (Ser. No. 76/281,737); AMERICA'S FAVORITE WATER HEATER (Reg. No. 2,566,340); AMERICA'S FAVORITE CHEESESTEAK (Reg. No. 2,561,713); AMERICA'S FAVORITE GOLF SCHOOLS (Reg. No. 2,535,729); AMERICA'S FAVORITE MUSHROOM (Reg. No. 2,520,064); AMERICA'S FAVORITE REPLACEMENT WINDOW (Reg.

No. 2,506,337); AMERICA'S FAVORITE VOICE MAIL (Reg. No. 2,590,036); AMERICA'S FAVORITE FAX ASSISTANT (Reg. No. 2,590,034); AMERICA'S FAVORITE RECEPTIONIST (Reg. No. 2,590,033); AMERICA'S FAVORITE WAY TO PAY (Reg. No. 2,520,689); AMERICA'S FAVORITE MUSIC (Reg. No. 2,514,110); AMERICA'S FAVORITE WORKBOOTS (Reg. No. 2,479,220); AMERICA'S FAVORITE SKINLESS CHICKEN SINCE 1981 (Reg. No. 2,420,309); AMERICA'S FAVORITE SOUR GUM (Reg. No. 2,347,915); AMERICA'S FAVORITE TRUCK CAMPER (Reg. No. 2,467,054); AMERICA'S FAVORITE ON-LINE SHRINK (Reg. No. 2,367,259); TUMARO'S GOURMET TORTILLAS-AMERICA'S FAVORITE (Reg. No. 2,419,870); TEMO SUNROOMS AMERICA'S FAVORITE ENVIRONMENT (Reg. No. 2,390,933); CHICKEN AMERICA'S FAVORITE (Reg. No. 2,315,085; 2,308,087); AMERICA'S FAVORITE (Reg. No. 2,263,243); AMERICA'S FAVORITE KARTING STORE! (Reg. No. 2,392,406); MISTER SPARKY AMERICA'S FAVORITE ELECTRICIAN (Reg. No. 2,331,109); AMERICA'S FAVORITE FOODS PRESTO (Reg. No. 2,299,622); AMERICA'S FAVORITE CANDIES (Reg. No. 2,359,173); AMERICA'S FAVORITE OMELETES (Reg. No. 2,242,272); BONGO BLUE JEANS ALWAYS AMERICA'S FAVORITE (Reg. No. 2,224,026); ATLANTIC CITY AMERICA'S FAVORITE PLAYGROUND (Reg. No. 2,209,885); DELTA CREAMCOAT-AMERICA'S

FAVORITE ACRYLIC PAINT (Reg. No. 2,425,990); AMERICA'S FAVORITE MADE FRESH (Reg. No. 2,164,875); AMERICA'S FAVORITE CORN DOG (Reg. No. 2,154,372); AMERICA'S FAVORITE CHOCOLATE CHIP COOKIE! (Reg. No. 2,149,887); AMERICA'S FAVORITE FRIES (Reg. Nos. 2,360,994; 2,244,139); AMERICA'S FAVORITE SINCE FBI (Reg. No. 2,119,233); IT'S AMERICA'S FAVORITE JELLY BEAN (Reg. No. 2,077,329); AMERICA'S FAVORITE KETCHUP (Reg. No. 2,098,790); AMERICA'S FAVORITES (Reg. No. 2,076,574); AMERICA'S FAVORITE FAVORS (Reg. No. 2,054,560); AMERICA'S FAVORITE SOFT PRETZEL (Reg. No. 2,155,994); AMERICA'S FAVORITE (Reg. No. 1,706,042); AMERICA'S FAVORITE MUSHROOM (Reg. No. 1,777,517); FAT FRED'S ORIGINAL SAUCE THE ORIGINAL BAR-B-Q-SAUCE FROM AMERICA'S FAVORITE AWARD WINNING RIBBER FAT FRED "IT'S ADDICTIVE" (Reg. No. 2,131,594); AMERICA'S FAVORITES ON THE GO! (Reg. Nos. 2,122,025; 2,034,322); BUMPERS AMERICA'S FAVORITE FOODS (Reg. No. 1,924,317); PLAY AMERICA'S FAVORITE PASTIME WITH AMERICA'S FAVORITE BEER (Reg. No. 2,063,618); AMERICA'S FAVORITE STORES FOR PEOPLE WHO LOVE TO MAKE MUSIC (Reg. No. 1,858,052); AMERICA'S FAVORITE OIL CHANGE (Reg. No. 1,899,204); AMERICA'S FAVORITE MUSIC (Reg. No. 1,810,310); AMERICA'S FAVORITE (Reg. Nos. 1,817,597; 1,791,096); AMERICA'S

FAVORITE HOLIDAY CANDY (Reg. No. 1,837,304); AMERICA'S FAVORITE PIZZA FEAST (Reg. No. 1,791,773); AMERICA'S FAVORITE 25K (Reg. No. 1,674,342); NATIONAL EXAMINER AMERICA'S FAVORITE FAMILY WEEKLY (Reg. No. 1,673,418); AMERICA'S SNACK FAVORITE (Reg. No. 1,638,019); AMERICA'S FAVORITE NEIGHBOR (Reg. No. 1,601,596); AMERICA'S FAVORITE MAIL (Reg. No. 1,605,872); "AMERICA'S FAVORITE BOAT RIDE" (Reg. No. 1,296,999); AMERICA'S FAVORITE NUTS (Reg. No. 782,607). (JA 1294-1618).

To place AIPC's use of "America's Favorite Pasta" in the proper context, there is undisputed evidence that the advertising and packages for AIPC's MUELLER'S brand of dried pasta products make no claim to MUELLER'S being the "# 1" seller by any measure. (JA 1894-95).

Each package of MUELLER'S brand packaged dried pasta which displayed the phrase "America's Favorite Pasta"[1] bears directly underneath, the phrase "Quality Since 1867." (JA 62, 1684, 1686). The packaging also states the following:

> [f]or over 135 years, pasta lovers have enjoyed the great taste of Mueller's. Our pasta cooks to perfect tenderness every time because it's made from 100% pure semolina milled from the highest quality durum wheat. Taste why Mueller's is America's Favorite Pasta.

[1] MUELLER'S PASTA LABELLA does not use the phrase "America's Favorite Pasta" on its packaging.

(JA 1624, 1684).

It is undisputed that MUELLER'S claims a brand heritage starting in 1867 and has been continuously sold to the present. (JA 1623).

NWP's reliance on the Wind Survey to establish that "[t]he phrase 'America's Favorite Pasta' is understood by a substantial number of consumers to be a meaningful statement that would require substantiation" does not create any genuine issue of material fact. Indeed, a review of the actual, verbatim responses of the respondents to one of the over forty questions asked demonstrate the clearly subjective meaning of "America's Favorite Pasta":

> Q 4(a) Does the phrase "America's Favorite Pasta" have any meaning to you?
>
> Q 4(b) What does it mean to you?
>
> Q 4(c) What else?

(See JA 565-1051).

Next, in paragraph E, "Industry Norms For Use of The Claim 'America's Favorite,'" NWP offers decisions of the National Advertising Division of the Better Business Bureau ("NAD") to establish a claimed "industry norm" for use of "America's Favorite." (NWP Br. 8-9). Below, NWP had proffered these NAD decisions as legal authority. (JA 1897). The District Court properly characterized "these decisions" as "not binding on the Court nor are they persuasive." (JA 1897). Now, for the first time, NWP offers these NAD decisions as "fact" to

influence this Court's perception of "industry norms" (NWP Br. 8-9, 20-21). Whether NAD decisions are "fact," or "law," a review of NAD decisions show no *per se* rule in the NAD that "America's Favorite..." must be substantiated as "#1 in sales." For example, in Kraft Foods, Inc. v. Maxwell House Coffee, June 1995 Vol. 25 No. 4 at p. 69, in the context of a nostalgic commercial for MAXWELL HOUSE coffee, the NAD found "the phrase 'The coffee perking in this pot is America's best-loved coffee' is not an objectively verifiable statement requiring substantiation but rather, is simply subjective puffery." *** "Overwhelmingly... consumers were taking away a message of nostalgia, history and tradition." *** "...no claim is being made about the current market position of Maxwell House." (ADD 11).

It is undisputed that the historical slogan "Quality Since 1867" appears on the Mueller's packaging, directly beneath the phrase "America's Favorite Pasta." (JA 62, 1684, 1686). This, along with the additional language on the packaging touting over 135 years of sales, great taste and quality, creates a context of historical fondness of the public for the brand and clearly characterizes the use of "America's Favorite Pasta" as puffery, with no reference to sales ascendancy. (JA 1622-24, 1684).

Looking specifically at three of the NAD decisions submitted by NWP, Gorton's/Aurora Foods, (JA 341-44), Jimmy Dean Sausages, (JA 352), and JC

Penney's, (JA 353), a reading of the facts and holdings do not support the claim of an "industry norm" made by NWP in its Brief. (See NWP Br. 8-9). In Gorton's/Aurora Foods, the issue presented to the NAD was that "for its Van De Kamp 44 count Fish Stick Value Pack" Aurora Foods "in sales materials... claims that Van De Kamp is 'America's favorite fish stick.'" (JA 341). This advertising supported the product's packaging which made the claim "America's #1 Fish Stick," which was based on dollar sales. Id. Thus, the meaning of "favorite" in the advertisement was directly associated with the claim of "America's #1 Fish Stick" on the packaging. (JA 343). In relying on this case, NWP's Brief does not accurately report the specific NAD ruling was that the claim "America's #1 Fish Stick," not "America's Favorite," was unsubstantiated for all Van De Kamp products. The NAD reached no specific conclusion with regard to the statement "America's favorite fish stick," since Aurora had stated it had no plans to use the term. (JA 344).

In Jimmy Dean Sausage, the accused advertising claim was "Jimmy Dean sausage is the number one selling breakfast sausage in the United States" coupled with the claim "Jimmy Dean Sausage. America's favorite sausage." (JA 352). Again, the advertiser itself defined "favorite" to be "number one" in sales in the subject advertisement. Id. In the decision, the NAD did not interpret the

"America's favorite" phrase *a priori* to mean "number one in sales," as argued by NWP as an "industry norm." Id.

In an interesting contrast to the position taken by NWP on "America's Favorite," in the JC Penney case the NAD commented on the subjective meaning of the word "favorite." (JA 353). In that case, JC Penney stated that it had become "America's favorite place to shop." Id. The claim was based upon a third party industry survey conducted by "Women's Wear Daily" a well-known industry trade journal, which identified reasons why a women's clothing store was considered to be a "favorite."

> The study explains that several different reasons were cited by the respondents for choosing a store as favorite. These reasons, in order of most cited to least cited were: Selection/Variety, Price, Location, Brand Name Quality, Sales/Discount, Size/Fit, Service, Money/Value, Ambience, Convenience, Charge/Membership, Guarantee/Return Policy. From this wide array of reasons cited, it is now clear to NAD that the combination of many features make a store women's favorite.

(JA 353).

Unless clearly tied to a specific reason, this study demonstrates that the word "favorite" has no exact definition in terms of a women's clothing store. For the NAD, context clearly determines the meaning of any statement made in advertising. The District Court was correct in finding the NAD decisions to be not

binding and not persuasive authority. The NAD decisions, collectively, create no "industry norm" for use of "America's Favorite."

SUMMARY OF THE ARGUMENT

1. NWP's claim that AIPC's use of "America's Favorite Pasta" was false advertising under the Lanham Act was properly dismissed, as a matter of law, by the District Court. The phrase is advertising puffery which no reasonable jury could conclude was a false or misleading representation of a material fact. There are no genuine issues of material fact.

2. To prove false advertising under the Lanham Act, NWP had to show, among other proofs, that "America's Favorite Pasta" is either a literally false statement of fact or implicitly false. AIPC presented to the Court, as a threshold matter, that the statement is mere puffery which is not actionable under the Lanham Act.

3. Puffery is either an exaggerated, blustering and boasting statement upon which no reasonable buyer would be justified in relying or a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than an expression of opinion.

4. The Court properly decided the issue of puffery as a matter of law since "America's Favorite Pasta" is the kind of general claim of superiority

which has no specific or measurable factual assertion of superiority or other product attribute.

5. There is no different "scientific" or "ad hoc" standard for considering puffery. The District Court fully examined the law of this Court and the other Circuits and properly applied it to the undisputed facts.

6. No Court requires a market research study to determine whether a phrase is puffery. Creating such a requirement would be counterproductive to the determination of a "fact" under Section 43(a) of the Lanham Act because of the level of confusion and misunderstanding inherent in the results of any market research study.

ARGUMENT

A. STANDARD OF REVIEW AND PROCEDURAL POSTURE OF THE CASE

The grant of summary judgment dismissing NWP's counterclaim is based upon Fed. R. Civ. P. 56. This Court reviews the District Court's decision de novo. Fenney v. Dakota, Minnesota & Eastern Railroad Company, 327 F.3d 707, 711 (8th Cir. 2003), reh'g denied, 2003 U.S. App. LEXIS 10709 (8th Cir. May 29, 2003). The District Court's denial of AIPC's Rule 12(b)(6) motion, which is not challenged on appeal, had limited the Court to a consideration of the allegations made in the pleadings. In contrast, the standard for deciding summary judgment

motions allows the Court to review all the evidence presented by the parties to determine if any genuine issues of material fact exist:

> The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The substantive law, here Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), determines the materiality of the facts. Fenney, 827 F.3d at 711.

Before the District Court, it was NWP which moved for summary judgment on its counterclaim that AIPC's use of "America's Favorite Pasta" was false advertising under the Lanham Act. (JA 1894). This was brought on as a cross motion to AIPC's motion to dismiss NWP's counterclaim under Rule 12(b)(6) claiming "America's Favorite Pasta" was mere "puffery," and not actionable under the Lanham Act. In the proceedings below, NWP asserted that there were no genuine issues of material fact on the issue of false advertising. This argument is repeated in NWP's Opening Brief which contends that summary judgment should be entered for NWP upon a mandate of this Court after reversal of the District Court. (NWP Br. 10).

There are no genuine issues of material fact. Neither party argued in the proceedings below that the District Court was foreclosed from deciding the

Lanham Act issues as a matter of law. In its Brief, NWP does not accuse the District Court of improperly weighing evidence in order to make its decision. Instead, NWP accuses the District Court of:

> [i]gnoring the plain meaning and plain content of an ad, ignoring evidence of substantial consumer confusion, one day finding an advertisement not puffing and days later deciding it is, is whimsy.

(NWP Br. 23).

This overheated language refers to the District Court's denial of AIPC's Motion to Dismiss under Rule 12(b)(6) two weeks prior to the denial of NWP's summary judgment and *sua sponte* dismissal of the counterclaim. The charge of "whimsy" is unfortunate, and itself utterly ignores the clear language of the District Court which fully explained the connection between its two decisions:

> [i]n order to resolve the issue of whether or not AIPC's use of the phrase 'America's Favorite Pasta' is literally false, and therefore, actionable, or ambiguous and mere 'puffery,' the Court would be required to consider facts outside the pleadings. For example, in attempting to prove its claim, defendant New World intends to rely on evidence of customs within the advertising industry and decisions issued by the National Advertising Division of the Better Business Bureau ("NAD"). While the Court could consider these facts and convert plaintiff's motion to a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(b), the Court declines to do so. There is a fully briefed motion for summary judgment pending.

(JA 1889).

The District Court saw no genuine issue of material fact concerning AIPC's use of America's Favorite Pasta in the marketplace:

> ... it is undisputed that in its 2001 Annual Report, AIPC did not claim that Mueller's is the largest selling brand of dried pasta in the United States. In addition, it is undisputed that Mueller's brand pasta is not sold anywhere west of the Mississippi River. The advertising and packages for AIPC's Mueller's brand of dried pasta products have not claimed that Mueller's is the best-selling pasta in the United States. Mueller's claims a brand heritage starting in 1867 and it has been continuously sold through the present.

(JA 1894-95). NWP does not challenge these undisputed facts nor does NWP assert it had inadequate notice on the issue of "puffery" which resulted in the *sua sponte* dismissal of the counterclaim. Maxwell v. Downs, 68 F.3d 1030, 1048-49 (8th Cir. 1995). NWP's fundamental position on appeal is that the District Court misapplied the law by adopting an "aberrant," "ad hoc standard for determining puffery." (NWP Br. 15-16). Thus, NWP makes no real argument that the District Court misapplied the standard for summary judgment under Rule 56. NWP directs the force of its argument, instead, at the District Court's application of the "substantive law" of false advertising under the Lanham Act. As set forth in the following sections of the Argument, the District Court fully understood the substantive law and applied it properly.

B. "PUFFERY" IN LANHAM ACT FALSE ADVERTISING CLAIMS

In its brief, NWP does not fully present the standard for determining false advertising claims under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). To create controversy regarding the appropriate standard of proof for "puffery" where none exists, NWP misfocuses on cases which look to consumer studies as requisite proof to establish implicitly false meanings from otherwise true statements of fact (See NWP Br. 11-13). NWP's argument ignores the fundamental nature of the elements of proof needed to establish a false advertising claim. In its two decisions on the issue of "puffery," the District Court employed the proper legal standards; and, in the absence of disputed material facts, properly dismissed NWP's counterclaim as a matter of law. (JA 1893-1901). Therefore, in order to dispel whatever confusion may have been caused by NWP's "analysis," AIPC presents a brief review of elements of proof for Lanham Act false advertising claims.

1. Section 43(a) Prohibits A False Or Misleading Designation Or Misrepresentation Of Fact

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) states, in pertinent part, that:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce

> any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, **false or misleading description of fact, or misleading representation of fact**, which—
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. (emphasis added)

The Lanham Act is very clear that a "false or misleading description of **fact**" or a "false or misleading representation of **fact**" is prohibited. In United Industries Corporation v. Clorox Co., this Court adopted a five point test used to establish proof of false advertising under the Lanham Act:

> (1) a false statement of fact by defendant in a commercial advertisement about its own or another's product;
> (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
> (3) the deception is material, in that it is likely to influence the purchasing decision;
> (4) the defendant caused its false statement to enter interstate commerce; and
> (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products.

140 F.3d 1175, 1180 (8th Cir. 1998)(citations omitted).

This test requires NWP to prove each of the elements. [2] United Indus., 140 F.3d at 1180. Thus, the critical, initial proof is whether or not there was a "false statement of fact." Id. To determine the first element, *i.e.*, whether a statement of fact is false or not, this Court has adopted the following view on the law:

> [t]he false statement necessary to establish a Lanham Act violation generally falls into one of two categories: (1) commercial claims that are literally false as a factual matter; and (2) claims that may be literally true or ambiguous but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers.

United Indus., 140 F.3d at 1180 (citations omitted).

To determine the "fact" issue, this Court also considers a "third category" which is referred to as "puffery" or "puffing":

> [m]any claims will actually fall into a third category, generally known as 'puffery' or 'puffing.' Puffery is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a).' (citations omitted). Non-actionable puffery includes representations of product superiority that are vague or highly subjective. See Southland, 108 F.3d at 1145; Cook, Perkiss & Liehe, Inc. v. Northern California Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990) (advertising that merely states in general terms that one product is superior is not actionable). However, false descriptions of specific or absolute characteristics of a product and specific,

[2] The failure to establish a false statement of fact is sufficient to support the summary judgment granted by the District Court. Moreover, NWP had not established any of the other elements of proof in the evidence it submitted to the Court.

> measurable claims of product superiority based on product testing are not puffery and are actionable. See Southland, 108 F.3d at 1145; Castrol, 987 F.2d at 945.

United Indus., 140 F.3d at 1180.

The District Court recognized this authority and properly applied it to the undisputed facts in the case now before this Court:

> [p]laintiff AIPC argues that its use of the phrase 'America's Favorite Pasta' is non-actionable 'puffery.' 'A court may consider as a matter of law whether the alleged misrepresentation in an advertisement is a statement of fact, actionable under the Lanham Act, or mere puffery.' In re Century 21-RE/MAX Real Estate Adver. Claims Litig., 882 F. Supp. 915, 926 (C.D. Cal. 1994)(citing Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv, 911 F.2d 242, 245 (9th Cir. 1990).
>
> 'Puffery is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a).' United Indus. Corp., 140 F.3d at 1180 (internal quotations omitted). Due to their generalized nature, advertisements or statements that fall into the category of 'puffery' do not meet the first and second elements required under § 43(a) because 'it is beyond the realm of reason to assert ... that a reasonable consumer would interpret [the puffery] as a factual claim upon which he or she could rely.' In re Century 21, 882 F. Supp. at 926 (citation omitted). Puffing applies to claims that cannot be proven false because they are not capable of measurement. United Indus., 140 F.3d at 1180; Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 946 (3rd Cir. 1993).

(JA 1898-99).

NWP's brief ignores not only the language of Section 43(a) but also its legislative history and the weight of authority in urging that no distinction can be drawn between statements of fact and general statements of opinions. It must first be recognized that an action under Section 43(a) is governed by its statutory provisions. Thus, the words of the statute requiring a false statement of fact must be met in order to establish a cause of action. Here the legislative history is compelling, in that early drafts of the bill prior to enactment left out the language "of fact." "Congress added the words 'of fact' to the original version of the Section in the 1988 amendments; the House Committee explained that the need to avoid constitutional challenge required this limitation, thus making it clear that the Section did not extend to false and misleading statements *of opinion.*" Gilson, Trademark Protection and Practice, §7.02[6][b][i][B] (2002) (emphasis in original); see also Congressional Record – House, p. H10420 (Oct. 19, 1988).

From this, it is clear that Congress in enacting the current language of Section 43(a) intended to exclude statements of opinion from statements of fact actionable under Section 43(a). This distinction has been clearly recognized by the leading treatises on unfair competition law. "[S]ection 43(a) makes actionable a 'false or misleading description *of fact*, or false or misleading representation *of fact.*' It does not impose liability for mere expressions of opinion." Gilson, supra (emphasis added). "'Puffing' may also consist of a general claim of superiority

over a comparative product that is so vague, it will be understood as a mere expression of opinion." 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:38 (4th ed. 1997)).

2. NWP's "Standard" To Determine "Puffery" Misconstrues The Law

To be actionable under the Lanham Act, a statement of fact must be false. 15 U.S.C. § 1125(a). Puffery, by definition, is not fact, let alone a false statement of fact since "no reasonable buyer would rely" on it. United Indus., 140 F.3d at 1180.

To confound this Court's appreciation of the District Court's clear understanding of this prevailing law, NWP cites to supposed authority which NWP claims requires every advertising claim to be tested by market research to determine its "message" before it may be considered "puffery." NWP seizes upon the "specific, measurable claims" language in United Industries to connect puffery to the Wind Survey, which, NWP asserts, creates a "specific, measurable claim" for the meaning of "America's Favorite Pasta." (NWP Br. 14). Without considering such evidence of consumer understanding, NWP argues, a Court cannot conclude that the statement is a "fact" or "puffery." NWP refers to this as the "scientific approach" and suggests that it was adopted by the Court in United Industries. (NWP Br. 11-14).

When reviewed, the authority NWP cites in support for its position turns out to be totally inapposite to the issues determined properly by the District Court. NWP has misconstrued the holdings of the authority, which deals with establishing proof for claims which may be literally true or ambiguous but which may implicitly carry a false impression. The cited authority does not deal with proof of "puffery," since puffery is not, itself, a specific or objective "fact." United Industries, 140 F.3d at 1180 ("Nonactionable puffery includes representations of product superiority that are vague or highly subjective.").

NWP's featured quotes from United Industries, – "public reaction is the proper measure of a commercial's impact," and "[i]t is not for the judge to determine, based solely upon his or her intuitive reaction, whether the advertisement is deceptive" - have nothing to do with an assessment of puffery. 140 F.3d at 1183; NWP Br. 13, 19. Instead, these quotes concern the issue of "implicitly false or misleading claims." United Indus., 140 F.3d at 1183. The law requires proof of what message the implicitly false claim of fact delivers to the consumer. Id. Such an inquiry is premised on the underlying claim, itself, stating a fact; and whether that fact, while true or ambiguous, has the capacity to mislead. Whereas, "... statements of general superiority are mere 'puffery' and are not actionable under the Lanham Act." Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1124 (8th Cir. 1999) (citing Lipton v. The Nature Co., 71 F.3d 464, 474 (2d

Cir. 1995) and Cook, Perkiss & Liehe, Inc. v. Northern California Collection Service, Inc., 911 F.2d 242, 246 (9th Cir. 1990).

NWP's reliance on the Second Circuit's important, early decision American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160 (2d Cir. 1978) is similarly misplaced. The Second Circuit was discussing the requirement for market research evidence to ascertain whether implicitly false representations were made by literally true statements. Id. Establishing whether market research is required to establish "puffery" was not considered in the Second Circuit's decision. Id.

The cases cited by NWP do not create a competing "scientific standard" used to assess puffery as opposed to the "ad hoc" standard which NWP accuses the District Court of adopting. NWP's attempted conversion of the proof standards for "implicitly false statements" into a requirement applicable to puffery has no support in the authority cited.

3. The District Court Properly Determined "Puffery" As A Matter Of Law

By creating the fallacious tension between a "scientific" approach and an "aberrant ad hoc" approach to determining puffery, NWP completely mis-portrays the law. To correct this, AIPC briefly surveys the law of the circuit courts which have looked at the issue of "puffery" as a matter of law.

The cases in the Third and First Circuits, which NWP contends practice the "scientific approach," each demonstrate, instead, a straightforward analysis of puffery which does not require consumer survey evidence to make the determination. In Castrol, Inc. v. Pennzoil Co., 987 F.2d 939 (3rd Cir. 1993), the charge of false advertising was leveled against Pennzoil's claim that Pennzoil motor oil "outperforms any leading motor oil against viscosity breakdown." Id. at 941. The Court considered whether the claim was a false statement of fact either literally or by implication. Id. at 945. In its defense, Pennzoil asserted that the claim was "puffery." Id. at 946. The Third Circuit stated that "puffery" was a general claim of superiority, not a specific claim of product superiority. Id. at 945. The "specific claim" relates to an intrinsic analysis of the nature of the claim itself. Id. at 946 ("performance which can be comparatively rated is not puffery."). The Court found Pennzoil's claim to be literally false and not "puffery":

> Pennzoil's claim of engine protection by contrast involves more than a mere generality. Here, the claim is both specific and measurable by comparative research. **In fact, Pennzoil seeks to substantiate its claims of superiority by reference to testing. This distinguishes the present case from those cited by Pennzoil, and defeats Pennzoil's assertion that its claims constitute only puffery.** (emphasis supplied)

Castrol, 987 F.2d at 945 (citations omitted).

The "testing" to which the Third Circuit refers related to "white coat science" measurements of motor oil viscosity in automobile engines. No market research was required to determine if the claim was "general" or "specific."

The First Circuit in Clorox Co. P.R. v. P & G, 228 F.3d 24 (1st Cir. 2000) considered the issue of "puffery" in reviewing a false advertising case arising in the District of Puerto Rico involving the "whitening" power of chlorine bleach and non-chlorine detergents. The First Circuit also observed that "puffery" is an "unspecified boast" upon which "no reasonable buyer would rely..." Id. at 37-38. This contrasts, again, with a statement of fact which makes a "specific and measurable claim of product superiority." Id. at 38. The First Circuit also determined how a literal falsehood is considered: first, what is the claim (or fact) conveyed; second, is that claim false. Id. at 34. The issue of puffery precedes the determination of whether the claim is false, since puffery by definition cannot be a statement of fact since no "specific, measurable claim" is made. Id. at 38-39.

The "threshold" nature of a puffery analysis is further established in the Ninth Circuit decision relied upon by NWP. In Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997), the Ninth Circuit reviewed the District Court dismissal of Lanham Act false advertising charges involving grass seed products. The Ninth Circuit relied upon the same five points to establish false advertising as this Court stated in United Industries. Id. at 1139. Among the

advertisements considered were two statements: "Less is More" and "50% Less Mowing." Id. at 1145. The District Court's conclusion that "Less is More" was puffery as a matter of law was confirmed by the Ninth Circuit which also reversed the conclusion of "puffery" for "50% Less Mowing." In its analysis, the Ninth Circuit stated:

> [w]hile product superiority claims that are vague or highly subjective often amount to non-actionable puffery... 'misdescriptions of specific or absolute characteristics of a product are actionable.'.. A specific and measurable advertisement claim of product superiority based upon product testing is not puffery... (internal citations omitted).

Southland, 108 F.3d at 1145.

Taking the well recognized definition of "puffery," the Ninth Circuit affirmed the grant of summary judgment that "Less is More" was non-actionable puffery:

> [t]he district court was correct in concluding that Defendants' 'Less is More' claim is non-actionable puffery. It is precisely the type of generalized boasting upon which no reasonable buyer would rely.

Id. No consumer market research was required to determine whether "Less is More" was generalized boasting or a specific, measurable fact.

Looking at the Ninth Circuit case, Cook, Perkiss, which NWP characterizes as the "leading case on this aberrant line" of "ad hoc" cases (NWP Br. 15), the law concerning Lanham Act false advertising is clearly stated. 911 F.2d 242. Again,

the same five point test, as adopted by this Circuit, is annunciated by the Ninth Circuit for determining false advertising. Id. at 244. The role of "puffery" is fully discussed with its position as a threshold consideration established:

> ... we still may determine as a matter of law whether this alleged misrepresentation is a statement of fact, actionable under the Lanham Act, or mere puffery.

Id. at 245. The Ninth Circuit then explained the rationale for a consideration of a statement to be "puffery" or "fact":

> [t]he common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions. 'Advertising which merely states in general terms that one product is superior is not actionable.' 'However, misdescriptions of specific or absolute characteristics of a product are actionable.' (internal citations omitted).
>
> * * *
>
> Here, the alleged misrepresentations in [defendant's] advertisement are merely general in nature. The statement that 'we're the low cost commercial collection experts' and any implication that [defendant] has comparable services to attorneys at lower rates are general assertions of superiority rather than factual misrepresentations. The advertisement does not contain the kind of detailed or specific factual assertions that are necessary to state a false advertising cause of action under the Act.

Id. at 246. This Circuit has directly relied upon this thoughtful analysis in considering "puffery" issues. See, e.g., United Indus., 140 F.3d at 1180-82; Porous Media, 173 F.3d at 1124.

The Fifth Circuit's well known decision in Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489 (5th Cir. 2000), cert. denied, 532 U.S. 920 (2001) is similarly derided by NWP as a case on the "aberrant" side. On the contrary, the Fifth Circuit's decision is another clear statement of the prevailing and generally accepted view of "puffery" in Lanham Act cases alleging false advertising:

> [e]ssential to any claim under Section 43(a) of the Lanham Act is a determination of whether the challenged statement is one of fact—actionable under section 43(a)—or one of general opinion—not actionable under section 43(a). Bald assertions of superiority or general statements of opinion cannot form the basis of Lanham Act liability. Rather the statements at issue must be a 'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.' As noted by our Court in Presidio: '[A] statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.' (internal citations omitted).

Id. at 495-96. To be actionable, therefore, the statement must make a measurable claim to superiority or other specific attribute. Non-actionable "puffery" on the other hand, is found to be of two types:

> [1] an exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely or [2] a general claim of superiority over a comparable product that is so vague, it would be understood as a mere expression of opinion.

Id. at 496 (citing 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:38 (4th ed. 1997)).

In Pizza Hut, the Court found that the phrase "Better Ingredients. Better Pizza," viewed either separately or together, was puffery. When "Better Ingredients" was given a frame of reference in advertising – bottled water and fresh tomatoes – the phrase went from non-actionable puffery to a specific or measurable "fact" which could be false on its face or by implication. 227 F.3d at 501.

In keeping with these authorities, "America's Favorite Pasta" was properly considered by the District Court, as a matter of law, to be non-actionable puffery. The undisputed facts do not provide the phrase with any "specific and measurable claim" of product superiority. In the District Court's thoughtful and complete analysis, the phrase "America's Favorite Pasta" is found to be an unquantifiable opinion of general superiority or boasting:

> [v]iewed in context, the phrase 'America's Favorite Pasta' is the kind of general claim of superiority that is 'so vague, it would be understood as a mere expression of opinion.' Pizza Hut, Inc. v. Papa John's Int'l Inc., 227 F.3d 489, 496 (5th Cir. 2000), cert. denied, 532 U.S. 920 (2001)(citing 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 27.38 (4th ed. 1996)). (emphasis supplied).
>
> Drawing guidance from the writings of our sister circuits and the leading commentators, we think that non-actionable 'puffery' comes in at least two possible forms: (1) an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying; or (2) a general claim of superiority over comparable products that is so vague that it can be

understood as nothing more than a mere expression of opinion. Pizza Hut, Inc., 277 F.3d at 496-97.

The term 'favorite' necessarily implies an opinion. Plaintiff AIPC has not specified that its Mueller's brand pasta is a favorite based upon any criteria for evaluating pasta. See In Re Century 21, 882 F. Supp. at 928 ("the chairman of RMI has 'declared RE/MAX #1 in the United States – and the World.' Not only is this mere opinion, but it makes no reference to the category in which RE/MAX is number one."). As recognized in Pizza Hut, Inc., 'Bald assertions of superiority or general statements of opinion cannot form the basis of Lanham Act liability.' 227 F.3d at 496 (citations omitted). To be actionable, the statements at issue 'must be a 'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.' Id. (citing Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999)).

Defendant has not persuaded the Court that the phrase 'America's Favorite Pasta' is a specific and measurable claim. Rather, the phrase is a 'general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.' Pizza Hut, Inc., 227 F.3d at 497.

Therefore, this Court finds as a matter of law that the phrase "America's Favorite Pasta" is mere puffery and is not actionable under the Lanham Act.

(JA 1899-1900).

The District Court's analysis set forth above is consistent with and properly implements the prevailing law. [3]

C. "PUFFERY" AS "MERE OPINION" IN ADVERTISING IS COMMERCIAL SPEECH

As perhaps the most eccentric issue raised in its brief, NWP argues that the "opinion" that MUELLER'S is "America's Favorite Pasta" has no constitutional opinion privilege under the Supreme Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) involving the law of defamation and the First Amendment. Ironically, NWP's own argument establishes the boasting nature of the claim "America's Favorite Pasta." NWP contends that "America's Favorite Pasta" is an opinion which represents a fact because it "falsely [asserts] that America holds an opinion" on its favorite pasta. (NWP Br. 17). The fantastical image of "America" having a "favorite pasta," clearly exemplifies the kind of exaggeration of a totally subjective concept which defines "puffery."

NWP's argument on the line of "opinion"/defamation cases is inapposite because such cases do not involve commercial speech. First Amendment

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[3] The Sixth Circuit has cited Papa John's with approval in deciding "redesigned and improved" was mere puffery under the Lanham Act. See Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d 687, 699 (6th Cir. 2003) (the "suggestion that the redesign is improved is mere opinion, which is not actionable under the Lanham Act."). Courts in the Second Circuit decide issues of "puffery" as a matter of law since "... the sort of subjective claims of product quality at issue here are nonactionable." Cytyc Corporation v. Neuromedical Sys., 12 F.Supp.2d 296, 301 (S.D.N.Y. 1998) citing Lipton v. The Nature Co., 71 F.3d 464, 474 (2d Cir. 1995).

protection of commercial speech may be limited in order to protect, as in the case of the Lanham Act, consumers and competitors from injury from unfair competition, including false advertising claims. 15 U.S.C. § 1125(a); Castrol, 987 F.2d at 949. The analysis of "mere opinion" and "specific fact" is made in the context of whether the statement is a "false or misleading statement of fact." 15 U.S.C. § 1125(a); United Indus., 140 F.3d at 1179 ("The Lanham Act was intended, in part, to protect persons engaged in commerce against false advertising and unfair competition."). Whether termed as an "opinion" or an exaggerated boast, puffery is non-actionable because it is incapable of being a "false and misleading... fact," admitting no empirical evaluation. See supra Section B(1); see also 15 U.S.C. § 1125(a); Pizza Hut, 227 F.3d at 499.

The District Court did not "neglect a major development of the law," as argued by NWP (NWP Br. 18).[4] The District Court's decision properly concluded, relying on authority generally accepted by the Circuits, that America's Favorite Pasta is "mere puffery and is not actionable under the Lanham Act." (JA 1900).

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[4] The admirable quotation of Judge Learned Hand, used by NWP, is from a pre-Lanham Act case involving a non-consumer commercial transaction. It is interesting to note that Judge Hand did go on to say that the statements made were "not the kind to be taken literally by the buyer." Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 857 (2d Cir.), cert. denied, 247 U.S. 507 (1918).

D. "PUFFERY" IS NOT AGAINST PUBLIC POLICY

NWP tries to discredit the practice of puffery in the trade and advertising industry as a "license to lie." (NWP Br. 16). On the contrary, the law of this Circuit recognizes it, United Indus., 140 F.3d at 1180. The unique role of "puffery" in advertising has recently been highlighted:

> "People like to buy from a company that claims it is the best, the biggest, or whatever" wrote Martin Pottle of Thomas Martin Inc. A truth-in-puffery law would "insult the intelligence of the American people," wrote Linda Kaplan Thaler, now of the Kaplan Thaler Group. It would, predicted James Paddock of Fitzgerald & Co., "literally destroy the advertising business as we now know it."

Wall Street Journal, "An Ad Professor Huffs Against Puffs, but It's A Quixotic Enterprise," Page A-9, col. 5 (Jan. 24, 2003).

NWP attempts not only to misportray the accepted law in Lanham Act false advertising cases into a manufactured contest between "scientific" and "ad hoc" standards; but, in fact, seeks to remove the puffery category by eliminating the distinction between statements of fact and opinions. There is no such tension in the law, nor should the puffery category, previously recognized by this Court, be eliminated.

E. NWP'S SURVEY EVIDENCE PROVIDES NO BASIS TO REVERSE THE DISTRICT COURT'S DECISION

The survey of "consumers" conducted by NWP's expert witness forms the centerpiece for the argument that America's Favorite Pasta is not mere puffery, but a false statement of fact. NWP declares: "The claim 'America's Favorite Pasta' is a measurable statement of fact. The claim conveys that in the opinion of American consumers, Mueller's is the favorite. Consumers believe that the claim conveys that Mueller's is the #1 selling pasta, and sold nationally." (NWP Br. 19).

As analyzed supra, NWP's cited authorities do not support the assertion that a "claim" must be subject to consumer testing to see if it is "general" or has "specific meaning."

The fallacy of this argument is readily apparent when applied to the present case. NWP's argument ignores the distinction between a statement being capable of measurement and the reaction of consumers being capable of measurement. The reaction to a statement is always measurable in market research. All one needs to do is to advance a position in a survey and take a count as to whether the respondent agrees or not. As argued by NWP, all claims are capable of objective measurement because one can take a survey on the reaction to that statement, thereby producing a measurable result. This position has not been adopted by this

Court, or any other, to determine whether a claim itself admits to an empirical measure or is "puffery."

Indeed, such a reliance on market research studies to determine the meaning of even specific statements of fact in false advertising cases has been recently rejected by the Seventh Circuit. Mead Johnson & Co. v. Abbott Lab., 201 F.3d 883, 885-86, reh'g en banc denied, 209 F.3d 1032 (7th Cir.), cert. denied, 531 U.S. 917 (2000). There, the District Judge relied upon a survey by plaintiff to determine what consumers believed "1st Choice of Doctors" to mean in the context of infant formulas. Id. at 884-85. Using the findings of the litigation survey, the District Court then applied them to the substantiation surveys offered by the defendant to support the specific "1st Choice" claim. Id. The Seventh Circuit reversed the District Court's finding of false advertising specifically focusing on the use of the plaintiff's "surveys" to define the meaning of "1st Choice of Doctors":

> [t]here is a deeper problem: the use of a survey in the first place. Surveys are accepted ways to probe for things such as confusion about the source of goods, for confusion depends on the effect of a phrase or trade dress on the consumer. So far as we can tell, however, never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held. Dictionaries themselves are a form of survey; lexicographers determine how words have been used in both scholarly and popular texts. But philologists and others who contribute to dictionaries devote their lives to discovering

> usage and interpreting nuance. It would be a bad idea to replace the work of these professionals with the first impressions of people on the street, especially because consumers' sketchy understanding of science means that survey results are apt to present firms with unrealistic demands for verification. (internal citations omitted).

Id.

In a later *per curium* opinion which amended some language in the decision after a rehearing, the Seventh Circuit further explained its rationale:

> [o]ur fundamental conclusion is that a producer cannot make a factual issue just by conducting surveys about how science is done (or, worse, about how surveys should be conducted). The sort of survey evidence [plaintiff] gathered would not support a conclusion by a reasonable person that [defendant's] claim either was false or implied a falsehood.

Mead Johnson, 209 F.3d at 1034.

Similarly, NWP's study "given the normal level of confusion and misunderstanding reflected in consumer surveys," cannot support a conclusion that a clearly general statement, America's Favorite Pasta, states a specific, measurable claim which is either false on its face or by implication. Id. The establishment of fact or puffery should not be determined by a contest of survey experts.

The District Court properly considered the nature of the words themselves to determine their meaning:

> The use of the term "favorite" is not literally false. The term "favorite" is ambiguous and does not necessarily refer to the best selling item in a

> category. It is logical that a product could be a favorite without being the best-selling product in its category. For example, a group of individual consumers could participate in a wine tasting study. Their favorite wine might be a red wine that sells for $200 a bottle. That wine would be their favorite, but it probably would not become the best-selling red wine due to its cost.
>
> **Furthermore, as plaintiff AIPC suggests, the term "favorite" is ambiguous. It could refer to a preference in quality, taste, price, or cooking ease. Defendant has not established that the words in the phrase "America's Favorite Pasta" have a specific meaning and that the phrase is unambiguously, literally false. (emphasis added).**

(JA 1897).

A reasonable jury cannot find that America's Favorite Pasta means only that MUELLER'S is the #1 selling pasta and is sold nationally. The general, subjective nature of the phrase would generate many different views. To require (or allow) survey evidence to determine the "meaning of words" "is so counterproductive that the basic position cannot be accepted." Mead Johnson, 209 F.3d at 1034.

CONCLUSION

America's Favorite Pasta is non-actionable puffery. The attempts by NWP to twist the accepted law in Lanham Act false advertising cases into a manufactured contest between "scientific" and "ad hoc" standards to consider "puffery" should be rejected. There is no such tension presented in the law.

The District Court was asked by both parties to decide, as a matter of law, whether America's Favorite Pasta was a violation of the Lanham Act. No dispute arises about the existence of genuine issues of material fact on the fundamental issues. The District Court considered these facts, the context of the use of the phrase by AIPC, and examined the law thoroughly. Following the authority of this Court, the District Court properly reached its conclusion that, "as a matter of law, the phrase 'America's Favorite Pasta' is mere puffery and is not actionable under the Lanham Act."

The decision should be affirmed.

Respectfully submitted,

AMERICAN ITALIAN
PASTA COMPANY

Dated: July 2, 2003

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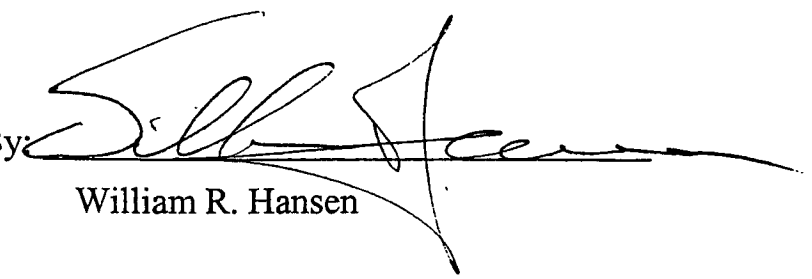
CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7), the undersigned certifies that the foregoing brief complies with the type-volume limitation as set forth in F.R.A.P. 32(a)(7)(B). This brief has been prepared in Times New Roman 14 point font using Microsoft Word 2002 XP. The foregoing brief contains 10,120 words.

Dated: July 2, 2003

By: 

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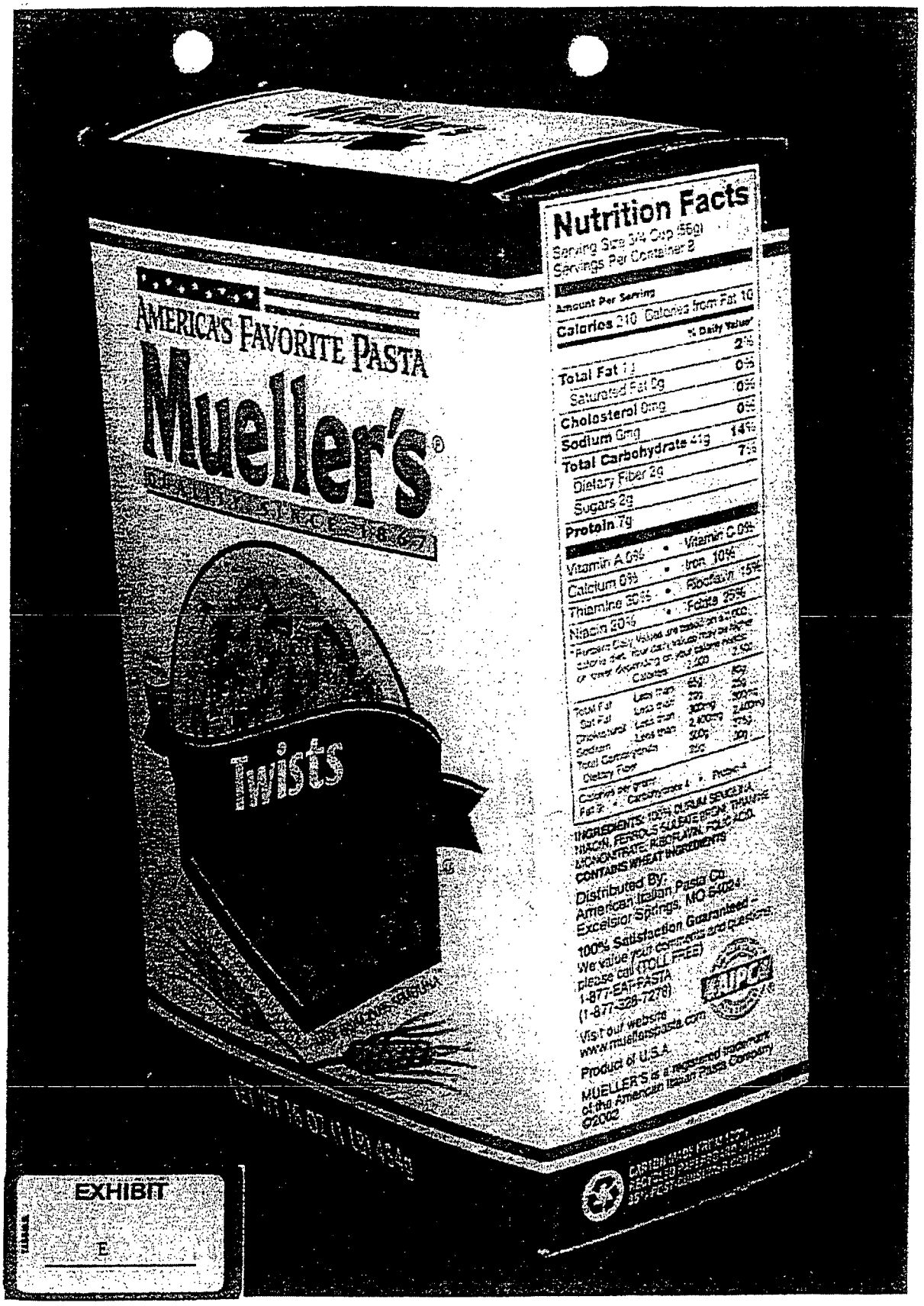
AMERICA'S FAVORITE PASTA
Mueller's
Twists
Nutrition Facts
Serving Size 3/4 Cup (56g)
Servings Per Container 8
Amount Per Serving
Calories 210 Calories from Fat 10
% Daily Value*
Total Fat 1g 2%
Saturated Fat 0g 0%
Cholesterol 0mg 0%
Sodium 0mg 0%
Total Carbohydrate 41g 14%
Dietary Fiber 2g 7%
Sugars 2g
Protein 7g
Vitamin A 0% • Vitamin C 0%
Calcium 6% • Iron 10%
Thiamine 30% • Riboflavin 15%
Niacin 20% • Folate 25%
INGREDIENTS: 100% DURUM SEMOLINA,
NIACIN, FERROUS SULFATE (IRON), THIAMINE
MONONITRATE, RIBOFLAVIN, FOLIC ACID.
CONTAINS WHEAT INGREDIENTS
Distributed By:
American Italian Pasta Co.
Excelsior Springs, MO 64024
100% Satisfaction Guaranteed
We value your comments and questions,
please call (TOLL FREE)
1-877-EAT-PASTA
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EXHIBIT
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JA1686

THIRD PARTY USES OF "AMERICA'S FAVORITE" in Connection with Food & Beverages

No.	Phrase Incorporating "AMERICA'S FAVORITE"	Description	
1.	**"America's Favorite Candy"**	A press release on the Red Cross web site refers to M&M's Chocolate Candies as "America's Favorite candy." Refers also to the Red Cross as "America's Favorite Charity."	
2.	**"America's Favorite Chicken"**	"America's Favorite Chicken" is a corporation headquartered in Atlanta Georgia; it is the parent company of Popeye's Fried Chicken and Biscuits and Church's Fried Chicken, two fast-food chains specializing in Southern-style fried chicken; Church's was the nation's second-largest fried chicken chain in 1992, the year America's Favorite Chicken was born.	
3.	**"The Complete Hamburger: The History of America's Favorite Sandwich"**	A book entitled "The Complete Hamburger: The History of America's Favorite Sandwich" was released in 1997, authored by Ronald L. McDonald.	
4.	**"America's Favorite Brand-Name Foods"**	A book entitled "Top Secret Recipes: Creating Kitchen Clones of America's Favorite Brand-Name Foods" was released in 1993, authored by Todd Wilbur.	
5.	**"America's favorite family restaurants"**	An advertisement in the "dining guide" section of www.wandtv.com, a local news website for ABC's local affiliate, contains a listing for the restaurant "BOB EVANS", calling it "one of America's favorite family restaurants, serving up hearty homestyle meals for nearly 40 years."	
6.	**"America's Favorite Wild Game Recipes"**	A book entitled "America's Favorite Wild Game Recipes." Internet ad refers to "time honored wild game recipes."	
7.	**"America's Favorite Beer & Wine Club Selections"**	The Wine Company is a retail store dealing in wines, beers and spirits; Its website at www.winecompany.com contains a header that says: "America's Favorite Beer & Wine Club Selections." Text refers to more than 1,000 wines, 1,250 beers, 50 single malt scotches.	

THIRD PARTY USES OF "AMERICA'S FAVORITE" in Connection with Food & Beverages

8.	**"America's Favorite Comfort Cookbook"**	A book entitled "Square Meals: America's Favorite Comfort Cookbook" written by Jane and Michael Stern.	
9.	**"Growing America's Favorite Vegetables"**	The Gardener's Companion consists of content available online by subscription, which is available at www.almanac.com. On that website, there is a page that refers to the Old Farmer's Almanac, and contains a section written by Marty Ross entitled "Growing America's Favorite Vegetables." The header also says "Growing America's Favorite Vegetables" otherwise referred to in the text as "America's top ten vegetables."	
10.	**"Mahatma- America's Favorite Rice"**	Riviana Foods Inc. sells rice under the Mahatma trademark. They tout Mahatma as being "America's Favorite Rice."	
11.	**"America's Favorite Fowl: Chicken"**	On a website called diabetic-lifestyle.com, there is an article entitled "America's Favorite Fowl: Chicken."	
12.	**"Apples- Nutritious and Tasty- America's Favorite Fruit Snack"**	At the University of Illinois website, there is a section called "Apples & More-Apple Education." In that section, there is an article entitled "Apples- Nutritious and Tasty: America's Favorite Fruit Snack."	
13.	**"Cherry Mash: America's favorite cherry flavored candy bar"**	Chase Candy Company produces and markets a candy product called "Chery Mash" since 1918 and calls it "America's Favorite Cherry Flavored Candy Bar."	
14.	**"Saluting America's Favorite fruit—apples"**	At a website located at www.mi-reporter.com, there is an article by Eileen Mintz entitled "Saluting America's favorite fruit—apples."	
15.	**"America's favorite food"**	A group that calls itself CHILI-USA is petitioning Congress (according to its website) to declare chili as America's national food. At the top of the web page found at http://members.aol.com/krum123/favorite.htm, are the words "America's Favorite Food?"	

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16.	**"America's Favorite Hot Dogs"**	At one of NBC's local affiliate's websites, there is an article entitled "America's Favorite Hot Dogs" (six different kinds: chili cheese dog, sauerkraut and mustard, plain with ketchup, Tex-Mex Dog, French Dog and Italian Dog).	
17.	**"America's Favorite Low-Calorie, Sugar-Free Foods and Beverages '**	The website for the Calorie Control Council (www.caloriecontrol.org) has a header that states: "Calorie Control Council- America's Favorite Low-Calorie, Sugar-Free Foods and Beverages"	
18.	**"America's Favorite Pot Roast"**	RecipeSource is a service at www.recipesourc.com which offers a searchable online archive of recipes. The header of one of the pages of this website states: "RecipeSource: America's Favorite Pot Roast"	
19.	**"Cry Baby- America's Favorite Sour Gum"**	Swell is a brand of chewing gum that makes a specific type of sour gum called Cry Baby, and publicizes it as "America's Favorite Sour Gum."	
20.	**"America's Favorite Fish Recipes"**	A book entitled "America's Favorite Fish Recipes" by Cy Decoss.	
21.	**"America's Favorite Cheesesteak, Steak Escape"**	A food service franchise called Steak Escape publicizes itself as having "America's Favorite Cheesesteaks." Text also states "maybe you've never heard of it before" and "the undisputed Mecca of cheesesteak lovers."	
22.	**"Hot Licks- America's Favorite Hot Sauce & Fiery Food Store"**	A store called "Hot Licks" located in San Diego, California, refers to itself as "America's Favorite Hot Sauce & Fiery Food Store."	
23.	**"America's Favorite Quick Breads & Desserts"**	A food company called Purely American states the following on its website (www.purelyamerican.com): "America's Favorite Quick Breads & Desserts." List multiple types of breads and desserts.	
24.	**"America's Favorite Restaurants and Inns"**	A book entitled "America's Favorite Restaurants and Inns: From Budget to Luxury" published in 1980, authored by Robert and Ellen Christopher.	
25.	**"America's Favorite Snacks Gift Basket"**	A company called Dreamaker Gift Baskets & Fine Gifts offers the following on its website home page (www.dreamakergifts.com): "America's Favorite Snacks Gift Basket."	

THIRD PARTY USES OF "AMERICA'S FAVORITE" in Connection with Food & Beverages

26.	**"America's Favorite Dinner Show"**	A theme restaurant called Medieval Times Dinner & Tournament claims to provide "America's Favorite Dinner Show" in its advertisement.	
27.	**"America's Favorite Brand Name Light Cooking"**	A book entitled "America's Favorite Brand Name Light Cooking."	
28.	**"America's Favorite Fresh Salsa"**	A Chachies Foods, Inc. claims in the header of a page on its website "Chachies-America's Favorite Fresh Salsa."	
29.	**"America's Favorite Treat"**	At the website for Winn-Dixie, a grocery chain, there is an article entitled "Celebrate with Ice Cream! Entertaining Tips with America's Favorite Treat."	
30.	**"America's Favorite: Apple Pie"**	A recipe for apple pie that is posted online at www.wmdt.com/cook/recipes/apple-pie.asp refers to apple pie as "America's Favorite."	
31.	**"America's Favorite Pork Chops"**	A recipe for pork chops is posted online at www.cdkitchen.com/rfr/data/962026573.shtml stating the following: "America's Favorite Pork Chops."	
32.	**"America's Favorite Beef Recipes"**	A book entitled "America's Favorite Beef Recipes: Great Home Cooking from Coast to Coast" by Softtware Books.	
33.	**"America's Favorite Pie Plant"**	An article located at www.plantea.com/rhubarb.htm is entitled "Rhubarb: America's Favorite Pie Plant." The article also refers to rhubarb as "truly beautiful."	
34.	**"America's Favorite Root"**	An article at www.horseradish.org/facts.html is entitled: "Facts About America's Favorite Root."	

THIRD PARTY USES OF "AMERICA'S FAVORITE" NON-FOOD

No.	Phrase Incorporating "AMERICA'S FAVORITE"	Description	
1.	**"America's Favorite Quilting Magazine"**	A magazine entitled "Quilt America's Favorite Quilting Magazine."	
2.	**"America's Favorite Golf Schools"**	A web site that promotes "America's Favorite Golf Schools," the "#1 choice in Golf School Vacations."	
3.	**"America's favorite gardening resource"**	Burpee offers seeds and plants; Its web site, www.burpee.com, contains the following header on its home page: "Burpee Seeds & Plants America's favorite gardening resource"	
4.	**"America's Favorite Detective"**	A series of novels starring the same detective, Ellery Queen, are the inspiration for the website www.keithcam.com/oldsite/queen.htm that states: "Ellery Queen- America's Favorite Detective."	
5.	**"America's Favorite Places to Live"**	The website www.relocate-america.com states "Discover America's Favorite Places to Live!"	
6.	**"America's Favorite How to Decorating Magazine"**	The website for a magazine entitled "Country Sampler Decorating Ideas" states: America's favorite how to decorating magazine."	
7.	**"America's Favorite Craft Magazines"**	A website, www.craftideas.com, contains the following slogan in its header "CRAFTIDEAS.COM" logo: "America's Favorite Craft Magazines."	
8.	**"America's Favorite Monkey"**	A website known as "Modern Humorist" has an article at www.modernhumorist.com/mh/0110/skylar/ entitled "Introducing America's Favorite Monkey."	
10.	**"America's Favorite Vacation Company"**	Apple Vacations states on its website, www.applevacations.com: "Apple Vacations- America's Favorite Vacation Company."	

THIRD PARTY USES OF "AMERICA'S FAVORITE" NON-FOOD

11.	**"America's Favorite Place on the Internet for Roof Help!"**	A company known as ROOFHELP states the following on its website: "America's Favorite Place on the Internet for Roof Help!"	
12.	**"America's favorite loophole"**	An article entitled "America's favorite loophole" by Jeff Schnepper can be found at http://moneycentral.msn.com/articles/tax/reduce/1387.asp.	
13.	**"America's Favorite Hometown Businesses"**	An article entitled "America's Favorite Hometown Businesses", authored by Leigh Buchanan, was published in Inc Magazine on 8/7/2002. "Wal-Mart may have trounced Main Street in the battle for consumers' dollars, but in the battle for their hearts and minds it's not even a contender. The best small companies can be charming, idiosyncratic, even lovable. They offer can't-find-it-elsewhere goods (possibly), warm personal service (probably), and something else -- the imprint of distinct human lives on brick and wood and formica. Sometimes they embody the spirit of a neighborhood or of an era. Sometimes they are the source of all earthly knowledge on a given subject. Sometimes they are your friends."	
14.	**"America's favorite Carpet"**	On its website, Coronet Industries refers to its carpets as follows: "Coronet, America's Favorite Carpet" (as a part of its logo).	
15.	**"America's Favorite Franchise Opportunity Network"**	In the header of its website, www. franchiseamerica.com, Franchise America states the following: "Franchise America is America's Favorite Franchise Opportunity Network."	
16.	**"America's Favorite how-to magazine for decorative artists"**	Decorative Artist's Workbook states the following on its website header at www.decorativeartist.com: "Decorative Artist's Workbook, America's favorite how-to magazine for decorative artists."	
17.	**"America's Favorite Wedding Web Sites"**	A wedding website directory at www.deejayz.com/usa/ states the following on its website: "Welcome to USA Wedding Links- America's Favorite Wedding Web Sites."	
18.	**"America's Favorite One Stop Shop 900 Number Connection"**	A website devoted to 900 numbers at www.net-interprises.com/american/ states the following: "America's Favorite One-Stop 900 Number Connection."	
19.	**"America's Favorite Hymns and Gospel Songs"**	A book of musical arrangements entitled "100 EZ Arrangements of America's Favorite Hymns and Gospel Songs."	

THIRD PARTY USES OF "AMERICA'S FAVORITE" NON-FOOD

20.	**"America's Favorite Partylines"**	A website called Dial-A-Date.com states the following: "America's Favorite Partylines and Chatlines."	
21.	**"America's Favorite Sailing Books"**	Sheridan House Publishers states the following on the header of its website at www.sheridanhouse.com: "Sailing Books from Sheridan House: America's Favorite Sailing Books."	
22.	**"America's Favorite Racing Stickers"**	A company called MJB Screenprint makes racing stickers under the brand name "RaceCals." Its logo depicts "RaceCals"in large stylized letters; used with a slogan that states: "America's Favorite Racing Stickers."	
23.	**"America's Favorite TV Chimpanzee"**	At http://kokomojr-tvchimp.com/ the following is stated: "Kokomo Jr., America's Favorite TV Chimpanzee."	
24.	**"America's Favorite Photographer**	An website devoted to photography touts an exhibition of the work of Ansel Adams and refers to the artist as "Ansel Adams: America's Favorite Photographer."	
25.	**"America's Favorite Car Rack"**	The following is stated at www.barrecrafters.com: "Barrecrafters- America's Favorite Car Rack."	
26.	**"America's Favorite Buildings"**	A paperback book entitled "America's Favorite Buildings" is a collection of 20 postcards published by Wiley in 1995. The article states "What buildings would you choose as your favorites?"	
27.	**"America's Favorite Architects"**	A paperback book entitled "Discover America's Favorite Architects" is a collection of short biographies published by Wiley in 1996.	
28.	**"America's Favorite Pedal Boats"**	A website advertising WaterWheeler pedal boats states the following: "WaterWheeler: America's Favorite Pedal Boats Keep Getting Better."	
29.	**"America's Favorite Therapist**	An article on Entertainment Tonight's website is entitled "America's Favorite Therapist" and is referring to Dr. Phil, a popular therapist that appears on talk shows like The Oprah Winfrey Show.	

THIRD PARTY USES OF "AMERICA'S FAVORITE" NON-FOOD

30.	**"America's favorite Free Gift Catalogs"**	The Mail Order Shoppe states the following on its website, www.mailordershoppe.com: "Personalized Gifts- America's Favorite Free Gift Catalogs"	
31.	**"America's Favorite Bird"**	An article entitled "Turkey Trivia: Fun Facts About America's Favorite Bird" appears at www.baltimoremd.com/content/turkey1.html.	
32.	**"America's Favorite Beetle"**	Am article about ladybugs on the Internet states the following in the header of www.geobop.com/Symbols/Animals/Insects/1/Ladybugs/: "Ladybugs, or Ladybird Beetles, America's Favorite Beetle!", and text states "Ladybugs = kids' favorites!"	
33.	**"America's Favorite Old-time Gospel Songs"**	A CD entitled "America's Favorite Old-time Gospel Songs" was released 6/11/2002.	
34.	**"America's Favorite Praise Songs"**	A CD entitled "America's Favorite Praise Songs" was released 6/11/2002.	
35.	**"America's Favorite Backyard Wildlife"**	A book entitled "America's Favorite Backyard Wildlife."	
36.	**"America's Favorite Tunes for Toddlers"**	A CD entitled "America's Favorite Tunes for Toddlers" was released April 2001.	
37.	**"America's Favorite Playground"**	A website promoting tourism in Atlantic City, New Jersey at http://philadelphia.about.com/cs/atlanticcitynj/ refers to it as "America's Favorite Playground."	
38.	**"America's Favorite Poems"**	A book entitled "America's Favorite Poems" was compiled by Robert Pinsky.	
39.	**"America's Favorite way to send Poinsettias"**	1-800-Poinsettias.com states the following on its website at www.1-800-poinsettias.com: "1-800-Poinsettias- America's favorite way to send Poinsettias, Wreaths and Holiday Flowers."	
40.	**"America's Favorite Radio Psychologist"**	The website promoting Dr. Joy Browne (www.drjoy.com) states the following: "Dr. Joy Browne- America's Favorite Radio Psychologist."	

NAD Case Reports

National Advertising Division
Council of Better Business Bureaus, Inc.

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VOLUNTARY SELF-REGULATION OF NATIONAL ADVERTISING

CONTENTS

ADVERTISING SUBSTANTIATED

NAD's findings are based on its own review and evaluation of advertiser's substantiation and, when necessary, on consultation with technical experts. *The reports may not be used for promotional purposes.* It is the policy of the Council of Better Business Bureaus not to endorse any company, product or service.

KRAFT FOODS, INC.
Maxwell House® Coffee
Ogilvy & Mather, New York, NY

- In order to determine the communication of an advertising message, the advertisement must be viewed and assessed as a whole

Basis of Inquiry: Television advertising for Kraft Foods, Inc.'s ("Kraft") Maxwell House® coffee was brought to the attention of NAD by The Procter & Gamble Company ("P&G"), maker of Folgers® brand coffee.

The series of advertisements featured the juxtaposition of many historical images, including footage from old Maxwell House campaigns, alongside newly shot footage. The claim in dispute, which is actually part of the old Maxwell House campaign footage, is:

- "The coffee perking in this pot is America's best-loved coffee"

Challenger's Position: P&G took issue with the claim "America's best-loved coffee" on the grounds that it felt that the "only reasonable interpretation of this advertisement is that Maxwell House is the leading ground product in the United States."

It submitted 12-month category share data from Information Resources, Inc. ("IRI") for the period ending 11/27/94, that indicated that Folgers had a 30.5% volume share as compared to the 25.6% volume share for Maxwell House.

Additionally, P&G submitted IRI individual brand data that indicated that Vacuum Folgers (Regular) was the leading brand.

In response to the advertiser's position that the spots are highlighting the history and heritage of the Maxwell House name, P&G essentially argued that the advertising communicates that what was true in the past is true now. Thus, P&G argued that "America's best-loved coffee", in the context of the ad, implies that just as it was the best selling coffee in the past, it is, likewise, the best selling coffee presently.

During the course of the inquiry, at NAD's urging, P&G conducted a communication study which, it argued, indicated that a significant portion of the viewers took away the message that Maxwell House was currently the leading selling brand of coffee—a message which P&G maintained is false. The study involved 250 female heads-of-household from six geographically-dispersed cities. The respondents were shown a the Maxwell House commercial at issue twice. They were first asked "What was the main idea of the commercial you just saw, other than to get you to buy the product?" and were then asked, "What other ideas, if any, is the commercial trying to say or show?"

After these two questions, respondents were asked if they recalled hearing the statement "The coffee perking in this pot is America's best-loved coffee." The 70% (or 175 people) who responded that they had recalled the statement were then asked the question, "What does the statement 'The coffee perking in this pot is America's best-loved coffee' mean to you?" According to the challenger's tabulation of responses, 29% of those who recalled the phrase (20% of the total respondents) took away the misleading message that the statement means "best selling" "favorite" or "most popular", 12% took away that it meant "best coffee" or "best tasting" (8% overall) and 10% (7% overall) took away a nostalgia claim. In short, P&G argued that 41% of those who recalled the phrase took away some form of preference claim, none of which were supported by the advertiser.

P&G admitted that although most consumers did not find that the main idea of the commercial was that Maxwell House was the most popular, most preferred coffee, a significant number (over the 20% generally regarded as above the "noise" threshold) were misled by the "best-loved" phrase into believing that Maxwell House is the most popular, most preferred coffee. P&G argued that Kraft should not be permitted to make what is understood to be a false statement of fact and cloak it in the guise of nostalgia.

In short, it was P&G's position that since the advertiser can not support a leading selling brand claim, the "America's best-loved coffee" claim should be modified or discontinued.

Advertiser's Position: It was Kraft's position that, in the context of the advertisements at issue, the phrase "America's best-loved coffee" is merely puffery and not a product claim.

Contrary to P&G's position, Kraft claimed that the commercials do not state or imply that Maxwell House coffee is America's "leading ground product" or that it is preferred over all other ground products. Rather, the commercial simply presents Maxwell House coffee in a general, historical context. Therefore, Kraft argued that the claim is classic puffery in that it is a statement that is "either vague or highly subjective and not capable of measurement."

Kraft argued that the commercials were intended to show Maxwell House as one of many American traditions. It pointed out that the clip with the subject phrase is actually from a 1964 Maxwell House commercial and uses the original voice-over from that commercial. Moreover, Kraft argued, the voice-over and image are old and scratchy, thus furthering the historical context of the clip.

Alternatively, Kraft argued that "[e]ven if the phrase 'America's best-loved coffee' were construed as a claim that Maxwell House brand coffee is America's best selling coffee, the statement would have been true when it was first made in 1964, and it would remain true today." Furthermore, Kraft argued that the claim when viewed in the historical context of the ads is substantiated by the fact that, over the years, the sales of Maxwell House have exceeded those of Folgers.

With respect to current sales, Kraft argued that Maxwell House coffee holds 29.3% of the market as compared to 28.7% of the market held by Folgers. It was Kraft's position that the sales figures should not be limited to "ground roast coffee" products but rather all the coffee products sold under the Maxwell House name and the Folgers name. Thus, these figures represent all coffee products on the market under those two brand names.

Kraft contested the results of the communications study as proffered by P&G and argued that, if anything, the study supported its position that the advertising is touting Maxwell House's historical position in American consumer history.

The advertiser stated that when respondents were asked what the main idea of the commercial was, not one responded that Maxwell House was the best selling coffee. Additionally, when asked what were the other ideas communicated by the ad, only one person out of 250 took away that Maxwell House was the best selling coffee in America.

Moreover, as to the question regarding what the subject phrase meant to respondents, Kraft argued that P&G's research was biased and non-representative because the meaning of the phrase was asked out of the context of the ad and therefore was not persuasive as to what the phrase meant in the context of the advertisement.

In any event, it was Kraft's position that even if the research was taken at face value, the results were misinterpreted by P&G so that, when inspected at closer examination, the results indicating a "best selling" take-away would fall below the "noise" level.

In short, Kraft contended that in order for P&G to have supported its assertion that the commercial communicated a best selling message, it would have had to show that: 1) "the phrase 'America's best-loved coffee', in the context of these ads taken as a whole, conveys to consumers an implied claim that Maxwell House is the largest selling brand of coffee in the United States; and 2) that this purported implied claim of largest selling relates to current sales." Kraft argued that P&G failed to show that either of these messages were taken away by consumers.

Decision: NAD finds that, within the very specific context of these advertisements, the phrase "The coffee perking in this cup is America's best-loved coffee" is not an objectively verifiable statement requiring substantiation but, rather, is simply subjective puffery.

At the outset, NAD was not persuaded by P&G's assertion that the only reasonable interpretation of the subject phrase was that Maxwell House was the leading ground coffee in America. Thus, during the inquiry, NAD notified P&G of this and felt that it was P&G's burden to show that the take-away of this ambiguous phrase was as it claimed (i.e., Maxwell House was the best selling coffee). In response, P&G proceeded to conduct a communication study in support of its position.

NAD agrees with P&G that the advertisements communicate a message that "what was true about Maxwell House then, is true about Maxwell House now". However, NAD also agrees with Kraft that, in the context of these nostalgic advertisements, no claim is being made about the current market position of Maxwell House. As noted above, NAD does not feel that the statement in question was unambiguous and, after careful examination of the communications study submitted by P&G, NAD finds that the study did not support the conclusion that the questioned phrase and/or commercial communicate a specific best selling, or other preference, claim for Maxwell House.

First of all, a close review of the verbatims in response to the main or other ideas questions revealed that the overwhelming response from the participants was that Maxwell House "has been around for a long time", or nostalgic sentiments to that effect. Conversely, very few (less than 5%) took away a superiority message of any kind and only one respondent out of 250 took away a direct sales superiority statement, and that was the result of the secondary "any other ideas" question.

Moreover, while open-ended questions are preferable and generally carry more weight, NAD agrees with P&G that, if properly posed, more guided questions could also be of value. However, NAD found that the question "What does the statement 'The coffee perking in this pot is America's best-loved coffee' mean to you? What else? Anything else?" was posed to respondents in a potentially problematic manner.

It is a well settled principle in advertising law that advertising must be assessed as a whole. The fact that P&G asked what the "best-loved" phrase meant to respondents by itself, as opposed to what respondents thought it meant in the context of the ad (even though the previous question asked respondents if they recalled the phrase from the commercial), was possibly detrimental to that question's reliability and credibility with respect to what that phrase would mean to consumers in the context of the advertisement.

However, even if NAD was to view the phrasing of the question in a manner most favorable to the challenger, we would still need to address the results as tabulated by P&G. As to this, NAD feels that the 29% of people who took away a "best selling" claim was not accurately tabulated by P&G. In figuring this 29%, P&G included a number of responses such as "That this is America's favorite coffee" and "That it must be the most popular".

NAD believes that P&G erred in including "favorite", "most popular", "most desired" and other similarly ambiguous responses along with "best selling" to come up with the 29% figure. Along the same lines, NAD believes that P&G erred in including a number of vague "best" responses in the "best coffee" category to arrive at its 12% figure. In short, NAD does not find that P&G has shown that consumers are taking away a specific "best selling" or "best coffee/tasting" claim from the "best loved" phrase and that the feed back for the various preferences claims, when tabulated separately, all fall below a figure of 20%, typically regarded as "noise".

Moreover, NAD disagrees with P&G that all the various types of preference responses should be added together and feels that the substantial variety of types of responses as to what the statement meant to those who recalled it (this was often true even within a specific response: for example, "That they feel it's the best loved coffee. (mean) It's the best (w/way) Guess the best selling (w/e) Best tasting") indicated that the phrase truly was ambiguous, thus supporting the conclusion that, in this ad, the phrase is nothing more than puffery.

Ultimately, due to the debatable manner in which this question was posed and the unconvincing results derived therefrom, NAD finds that the results of this question failed to show that people were taking away a specific message of sales, or other definable superiority, for Maxwell House. This, coupled with the fact that the answers to what the main and total communication of the commercial overwhelmingly indicated that consumers were taking away a message of nostalgia, history and tradition, leads NAD to believe that consumers were not taking away a false message from the commercial. However, NAD notes and acknowledges, for the record, that in a different context the statement at issue in this case could very well be considered a "claim" for which an advertiser would need substantiation.

Therefore, since NAD finds that Kraft was not making an objectively verifiable claim, it will not delve into the relative merits of the parties' arguments regarding the question of which is actually the best selling brand.

In sum, NAD finds that the phrase "The coffee perking in this pot is America's best-loved coffee", in the context of these nostalgic advertisements, is nothing more than subjective puffery for which substantiation is not required.

Advertiser's Statement: "Kraft Foods, Inc. is pleased to see that its Maxwell House coffee advertising has been upheld. We believe this advertising fairly and positively communicates Maxwell House's image and heritage. Kraft Foods supports the voluntary advertising regulation process of the NAD." [#3201BSS, closed 4/24/95]

OSCAR MAYER FOODS CORPORATION
Claussen Refrigerated Pickles
J. Walter Thompson/Chicago, IL

* An advertiser may make an "apple to orange" comparison so long as the basis for that comparison is clearly disclosed

Basis of Inquiry: Television advertising for Oscar Mayer Foods Corporation's (Oscar Mayer) Claussen refrigerated pickles was brought to the attention of NAD by the Campbell Soup Company (Campbell), maker of Vlasic pickles.

The commercial (in various time lengths) features a "balloon artist" who explains that he has chosen a new medium for his art, the "cooked pickle". The artist shapes the cooked (or pasteurized) pickle into various shapes including a moustache, a smile and a crescent moon. Before he does this, he holds the pickle by one end, shakes it and explains that the cooked pickle is ideal for this activity because it is "flexible".

Later in the spot, as the artist explains that Claussen refrigerated pickles are not good for this art form, there is a close-up of the snapping of a Claussen pickle. The visual is accompanied by the claim:

> "Most pickles are cooked, but Claussen pickles are never cooked and always kept cold, so they're crunchier than cooked pickles."

The ad also features the tag line: "Claussen. They're crunchier."

Challenger's Position: Initially, the challenger referred NAD back to a June, 1992 NAD decision involving the same products but a different commercial. In that case, NAD requested that Oscar Mayer modify its advertising to take into account the fact that a substantial number of cooked (also referred to as "pasteurized" or "shelf-stable") pickles do snap cleanly and requested that the word "limp", which was used to describe the pasteurized pickle, be discontinued because it was an overstatement of the product's textural characteristic.

Campbell challenged this advertising on that grounds that the new execution, likewise, overstates the product differences and on the basis of new laboratory testing that, according to Campbell, "proves the lack of material difference between the snapping properties of Claussen refrigerated pickles and pasteurized pickles." In short, it was the challenger's position that the commercials communicate that there are two types of pickles: "those which are limp and not crispy and those which are firm and crunchy."

The New Execution: In the prior NAD decision, NAD found that Oscar Mayer had supported a crunchier claim but that the commercial overstated the differences between Claussen and pasteurized pickles. Campbell argued that, even if NAD still accepts the substantiation for the crunchier claim, the new execution of the commercial goes well beyond crunchier claim and implies that pasteurized pickles always bend and never snap while Claussen pickles always snap. Campbell argued that the advertiser's own testing only showed that Claussen simply snapped more frequently than pasteurized pickles. Campbell objected to the use of the word "flexible" and the accompanying visual depicting the bending of the pasteurized pickle, arguing that the new commercial runs contrary to the prior NAD recommendation that the advertiser discontinue the use of the word "limp" as a description of the pasteurized pickle's texture.

The Laboratory Testing: The challenger argued that a bias in favor of refrigerated pickles exists in conducting laboratory testing between refrigerated and pasteurized pickles by manual methods. In response, Campbell employed an apparatus, known as the Instron device, intended to "measure the snapping and bending properties of pickles and produce objective, reliable and replicable results comparing different types and brands of pickles."

In brief, the testing called for the pickles to be visually centered on a wedge and held in place by a "crosshead" device which was manually lowered down on the pickles until the prongs touched the pickle slice. Then, the crosshead was lowered on the pickles at a constant speed for a distance of 40mm. A "snap or break" was considered to have occurred if the pickle broke or snapped at the center and the two halves fell off the wedge or if the pickle broke or snapped but was held together by the skin. A failure to snap or break was in situations where the pickle did not snap or bend at all or tore unevenly and was held together by the skin.

In response to the advertiser's argument that the crosshead speed used by the challenger was too fast, Campbell argued that the crosshead speed was derived from observing the videotapes of the commercials and attempting to approximate the speed of the balloon artist's snapping action. Also, Campbell countered that the crosshead speed cited in the literature submitted by Oscar Mayer related to puncture tests and resistance to crushing as opposed to testing for relative snappability.

As to the alleged mishandling of the Claussen pickles, the challenger argued that consumers do not keep the products refrigerated according to Oscar Mayer's shipping instructions but that, typically, pickles are removed from the brine and generally served with dinner and do in fact sit out for some time. Additionally, the challenger maintained that Oscar Mayer improperly asserted that the pickles were left out for 30 minutes, when instead all the pickles were tested within a 30 minute time period.

The results of this testing, in terms of snapping percentages or "ratios", indicated that 78% of the Claussen pickles snapped and the snapping percentages for the shelf-stable pickles ranged from 64% to 79%.

Thus, Campbell argued that "any visual or verbal representation that there is any material difference with respect to the limpness, firmness, bending or snapping characteristics of the shelf-stable pickles as compared to Claussen refrigerated pickles is blatantly false."

Advertiser's Position: It was Oscar Mayer's position that the new commercial depicts, in a humorous way, that Claussen pickles are crunchier and snap more readily than shelf-stable pickles like Vlasic, as opposed to the challenger's assertion that "shelf-stable pickles always bend while Claussen pickles always snap."

In support of its position, the advertiser submitted, on a propriety basis, a manual test of bendability of pickle halves among Claussen, Vlasic and two other leading competitors. The results of this test indicated that 95% of the Claussen pickles snapped as compared to 32% for Vlasic.

The advertiser also submitted a "puncture test" to discern the relative firmness of the interior endocarp portion of the pickle. The purpose of the test, according to the advertiser, was to evaluate cucumber and pickle texture. While there was only statistical significance superiority with respect to one of the three competitors, the results were consistent with those found in the bendability test.

The advertiser also submitted, on a proprietary basis, a confirming snappability test wherein a total of 100 Claussen pickles and 100 Vlasic pickles were tested. The results indicated that 91 of the 100 Claussen pickles snapped while 42 of the Vlasic pickles snapped. A "snap" was defined as a "pickle [that] breaks with clean cut and crisp clear sound."

The advertiser further argued that it took great pains to insure that the television demonstrations were produced in a manner so as to accurately represent the respective product's textural attributes. In support of this position, the advertiser submitted the methodology employed in creating the demonstrations as well as the producer's affidavit confirming that the methodology was followed.

Challenger's Criticism of Advertiser's Testing: While the challenger did not have access to the advertiser's full testing methodologies, it argued that the non-blind, manual methods employed in the advertiser's testing created a bias as to render the testing fatally flawed.

The challenger argued that the test should be conducted blind by means of a mechanical instrument which can maintain identical force and speeds for all pickles. This is so because the identities of the shelf-stable and refrigerated pickles would be "readily apparent to any human tester which would subject them to the commonly held preconception that refrigerated pickles snap more readily."

Advertiser's Criticism of Challenger's Testing: The advertiser had many criticisms of the challenger's testing. First, the advertiser argued that the crosshead speed (the speed at which the device was lowered down on the pickles) was "unusually fast" for a test of this type. The advertiser submitted a study entitled, "Instrumental Texture Measurements on Pickles", in which it is stated that the generally employed crosshead speed should be between 25 to 200 mm/min. Campbell used a speed of 1021 mm/min. The result of this, the advertiser argued, is that it would make softer pickles behave as if they were firmer and crisper, and thus snap more like a crispier pickle.

Moreover, the advertiser complained that the handling of the Claussen pickles rendered the challenger's test fatally flawed. The advertiser noted that the Claussen pickles were stored at 41-46 degrees at the test site, which is warmer than the 32-38 degree recommendation on the Claussen shipping instructions. Furthermore, the protocol called for the Claussen pickles to be removed from the brine and held at room temperature for thirty minutes before slicing. This, the advertiser argued, is contrary to the pack instructions which state "must be refrigerated". In short, the advertiser argued that draining the brine and letting the pickles sit for 30 minutes unrefrigerated was "injurious to the quality of the product and degraded the textural properties and crispness."

Finally, the advertiser argued that, even giving the challenger the benefit of the doubt on its testing, the aggregate results of the shelf-stable pickles compared to the Claussen pickles reveals that Claussen had a higher frequency of snapping than the aggregate of the competitive shelf-stable brands at a 95% confidence level.

Decision: NAD's inquiry consisted of two levels: 1) did the advertiser provide a reasonable basis to make its "crunchier" superiority claim; and, 2) if so, does the commercial accurately communicate that superiority without overstating the distinctions between the Claussen refrigerated pickle product and the shelf-stable, pasteurized pickles like Vlasic.

The Crunchier claim: As to the first portion of the inquiry, NAD finds that, while neither the advertiser nor the challenger's testing is perfect, the advertiser has provided a reasonable basis to make a crunchier claim. Conversely, NAD finds that the challenger's testing failed to overcome this reasonable basis. The two snappability/bendability tests that the advertiser submitted showed a dramatic and statistically significant superiority in snapping/crunchiness for Claussen refrigerated pickles over shelf-stable pickles.

Patent and Trademark Office Trademark Trial and Appeal Board

In re Wileswood, Inc.

Decided Nov. 29, 1978

TRADEMARKS

1. Marks and names subject to ownership — Descriptive — How determined (§67.5073)

Evaluation of meaning projected by marks must take into consideration phrases, goods in connection with which they are used, context in which expressions are used, significance of notations in relation to goods, and likely reaction of average purchasers to phrases as they are encountered in market.

2. Evidence — In general (§67.331)

Photoprints of newspaper news or feature articles are, in absence of at least, in ex parte case, affidavits from persons purported to be quoted in articles, merely hearsay entitled to very little weight.

3. Marks and names subject to ownership — Descriptive — In general (§67.5071)

Expression that consists of merely laudatory words is not entitled to protection as trademark in absence of compelling proof that it has acquired secondary meaning to general public.

4. Marks and names subject to ownership — Descriptive — Particular marks (§67.5081)

"America's Best Popcorn!" and "America's Favorite Popcorn!" are merely laudatory epithets describing claimed quality and popularity of applicant's unpopped popcorn.

Appeal from Examiner of Trademarks.

Application for registration of trademarks of Wileswood, Inc., Serial Nos. 80,564, and 80,565, filed Mar. 17, 1976. From decision refusing registrations, applicant appeals. Affirmed.

Paul F. Stutz, Toledo, Ohio, for applicant.

Before Lefkowitz, Rice, and Kera, Members.

Kera, Member.

Applications have been filed by Wileswood, Inc. to register, on the Principal Register, the designations "AMERICA'S BEST POPCORN!"[1] and "AMERICA'S FAVORITE POPCORN!"[2] each for unpopped popcorn.

Each application stands finally refused on the sole ground that the mark is merely descriptive of the goods within the meaning of §2(e)(1) of the Trademark Act.

Applicant appealed and submitted the cases on its briefs. The Examiner filed a statement in each appeal.

Applicant's position is that a mark, to be refused registration under §2(e)(1) of the statute, must be "only" or "solely" descriptive of the goods; that the mark as a whole must be considered; and that the marks presented for registration are attention-getting, tongue-in-cheek, self-laudatory, or boastful designations or characterizations of its popcorn, which marks cannot be literally true because there is no objective measure or test of what is the "best" or "favorite" brand or variety of a widely available commodity; and that the exclamation point, in conjunction with the words, creates an entity which is, at most, suggestive of the goods and is therefore registrable.[3]

[1] Ser. No. 80,564, filed March 17, 1976, alleging first use on Dec. 8, 1975.

[2] Ser. No. 80,565, filed March 17, 1976, alleging first use on Dec. 8, 1975.

The Examiner agrees that the registrability of each mark must be determined on the basis of the expression as a whole but contends that the meanings of the words may, indeed must, be considered in reaching the ultimate conclusion; that the word "popcorn" is simply the common noun for the goods; that "AMERICA'S BEST" and "AMERICA'S FAVORITE" are merely laudatorily descriptive phrases; and that the exclamation point is not sufficient to make registrable trademarks out of the expressions sought to be registered.

The proper application of §2(e)(1) of the Trademark Act to certain kinds of marks may present some of the thorniest problems which are encountered in the examination of applications for the registration of marks. The words of the statute are few and apparently simple:

> "Sec. 2 (15 U.S.C. 1052. Trademarks registrable on the principal register.
> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it —
> * * *
> (e) consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them . . . ."

Those words constitute the statutory mandate for applying a variety of different policy reasons to deny registration to marks on the Principal Register.

The sorting out of the various concepts embraced by the cryptic language of §2(e)(1) is one of the problems involved in the proper construction and interpretation of the statute. The second problem is to decide, in a particular case, whether a given mark falls within the class of registrable or unregistrable marks, that is, whether, as a matter of applying the policy of the statute, a mark is or is not deserving of the rights and presumptions accorded by virtue of registration on the Principal Register. This question often appears in the form of an inquiry whether a mark is merely descriptive (unworthy of registration absent a showing of secondary meaning) or only suggestive (entitled to registration). The determination is made in the light of the mark as applied to the goods or services and on the basis of the record which the applicant presents.

In the present case, we have to decide whether "AMERICA'S BEST POPCORN!" and "AMERICA'S FAVORITE POPCORN!", as used for popcorn, are merely suggestive of high quality and desirability, and thus registrable, as contended by applicant, or are so laudatory and lacking in the ability to distinguish applicant's goods from anyone else's popcorn as to be unregistrable on the existing record, as argued by the Examiner.

We can start by stating that the exclamation point in each mark merely emphasizes the message conveyed by the words. By itself, the punctuation mark does not add any inherent distinctiveness to either mark. See: In re Burlington Industries, Inc., 196 USPQ 718 (TT&A Bd., 1977).

[1] Next to be considered are the expressions "AMERICA'S BEST POPCORN" and "AMERICA'S FAVORITE POPCORN" (the exclamation points have been omitted to emphasize that we are considering the phrases composed of the words because these phrases, in our opinion, are what generate the commercial impression). Our evaluation of the meaning projected by the two notations must take into consideration the phrases, the goods in connection with which they are used, the context in which the expressions are used, the significance of the notations in relation to the goods, and the likely reaction of average purchasers to the phrases as they are encountered in the market. See: In re International Spike, Inc., 190 USPQ 505 (TT&A Bd., 1976); In re Marine Protein Corporation, 183 USPQ 112 (TT&A Bd., 1974).

[2] We have no doubt that, as used in the manner made of record in the applications, both phrases are intended to be regarded and will be understood by the purchasing public as applicant's own appraisal of the quality and popularity of its popcorn. That the expressions are applicant's own praises of its product is beyond question. Whether the self-laudation is justified cannot be determined. There are no sales figures or advertising expenditures in the record. Although there are in the record some photoprints of what appear to be newspaper news or feature articles, these are, in the absence of (at the very least in an ex parte case) affidavits from the persons purported to be quoted in the articles, merely hearsay entitled to very little weight. See: Standard Pressed Steel Co. v. Midwest Chrome

[3] We have combined in one summation the arguments advanced by applicant in both appeals, which are couched in similar but not identical language.

Process Company, 183 USPQ 758 (TT&A Bd., 1974), affirmed in part, 191 USPQ 106 (DC Ill., 1976). For all that appears, the various stories are simply repetitions of a few public relations press releases. The stories apparently refer, moreover, primarily to the sale of popped popcorn, not the unpopped popcorn identified in the two applications.

It further appears that applicant sells its products only in three retail outlets, one in Huron, Ohio, one at the Dayton Municipal Airport, and one at the Greater Cincinnati Airport located in Boone County, Kentucky, (page 5 of applicant's brief on appeal in Serial No. 80,564). There is a very thin evidentiary basis for claiming that the unpopped popcorn is America's best or America's favorite, as factual propositions.

The net result is that the two expressions in question amount to nothing more than trade puffery or self-laudatory expressions of applicant's product and would be so understood. The use of each expression as a sub-headline on a leaflet under the major headline consisting of the registered trademark "COUNTRY STORE POPCORN" and the appearance on the same page of the tagline "Everyone likes POPCORN!" (for which no trademark claim has been or could be made), in letters at least as prominent in size and weight as the expressions for which registrations are sought, supports our view that applicant is fond of using prominently displayed phrases to help to sell its product without discriminantly emphasizing those phrases which are legitimately of a trademark character.

It is believed that the purchasing public would understand the notations in issue just as we do; this is reinforced by the absence of any indication that applicant's unpopped popcorn is actually America's favorite (which might be a factually demonstrable statement, at least transitorily, for the popcorn with the highest share of the market) or America's best (which could only be everyone's subjective opinion), so there is no unique marketing position enjoyed by applicant and known to the general public to which either of the slogans could refer. The expressions do not reflect a status or reputation which could belong only to applicant so that a right of exclusive use would only reflect the facts and conditions of the marketplace (we express no opinion on the registrability of the expressions if this unusual situation did exist). Instead, the phrases in question are only self-awarded laudations of applicant's product, which others might be equally entitled to use, for whatever they are worth, for the same product.

In assessing the meaning and likely commercial impression of the phrases "AMERICA'S BEST POPCORN" and "AMERICA'S FAVORITE POPCORN," we have, of course, focussed on the words "BEST" and "FAVORITE" because those are the key words of the two notations. However, we have, all the while, borne in mind the totalities of the two expressions. In our view, the word "AMERICA" serves merely to reinforce the message being communicated. This is not merely Ohio's best popcorn and Ohio's favorite popcorn. In all of America, according to applicant, this is the best and favorite unpopped popcorn. The geographical name "AMERICA" simply adds to applicant's boastfulness.

[3] When an expression consists of merely laudatory words, it is not entitled to protection as a trademark in the absence of compelling proof that is has acquired a secondary meaning to the general public. McCarthy's treatise, Trademarks and Unfair Competition, §11:5, Vol. 1, pp. 353-354 (1973), summarizes the proposition thusly [footnotes omitted]:

> "Today, the law is that marks which are categorized as 'descriptive' cannot be protected unless secondary meaning is proven. The common law has long embodied the rule that terms which are merely descriptive of the qualities, ingredients or characteristics of a product cannot be protected as 'technical' trademarks . . . Marks which are merely 'laudatory' and descriptive of the alleged merit of a product are also regarded as being 'descriptive'. This includes such marks as GOLD MEDAL, BLUE RIBBON and the like.
>
> * * *
>
> [T]he two basic reasons for the rule that descriptive terms, in the absence of secondary meaning, are not capable of trademark protection [are]:
>
> (1) Descriptive adjectives can be truthfully applied to a whole range of goods and services. Thus, a descriptive term cannot, per se, function to identify and distinguish the goods or services of only one seller in the marketplace.
>
> A descriptive term merely informs the buyer of an alleged quality of the product. Many other products may have similar qualities, and use of the term will not help the consumer to distinguish products of different sellers. For example, the use of BEST on writing paper or TASTY on bread merely describes something about the product. To the consumer, these terms are merely laudatory or informative advertising
>
> * * *
>
> (2) Descriptive terms are regarded as words in the public domain in the sense that all sellers should be free to truthfully use these terms to describe their merchandise. For example, the Court of Customs and Patent Appeals stated that descriptive terms cannot be accorded protection since, 'for policy reasons, descriptive words must be left free for public use' [citing In re Colonial Stores Incorporated, 157 USPQ 382 (CCPA, 1968)]."

The Court of Appeals for the Second Circuit elaborated the policy underlying the refusal to accord protection to laudatory words in Supreme Wine Co., Inc. v. The American Distilling Co., 135 USPQ 481 (1962):

> "We hold that the word 'supreme' is so totally lacking in distinctiveness, originality and uniqueness that, in the absence of compelling proof that it has acquired a secondary meaning to the buying public, it is not entitled to trademark protection. Accordingly, we affirm the order below insofar as it denies the apellant the right to register 'Supreme' as a trademark, and reverse that portion of the order which holds that the appellant infringed rights of the appellee in 'Supreme' and 'Bourbon Supreme' and orders an accounting.
> In order to qualify for trademark protection, a mark must be distinctive, that is, it must be capable of distinguishing the user's goods from others. Merely laudatory words, such as 'best', 'outstanding', or 'supreme' cannot of their own force indicate the source or origin of the labeled goods. As was said in Burmel Handerkchief Corp. v. Cluett, Peabody & Co., 127 F.2d 318, 321, 53 USPQ 369, 372 (CCPA 1942) (holding 'Handkerchiefs of the Year' invalid):
>
> > 'In the final analysis such expressions as we are discussing with relation to objects of trade are a 'puffing of wares' and are intended to call attention to the superiority of the advertised goods. Such expressions are a condensed form of describing in detail the outstanding character or quality of the objects to which they are applied.
> > * * *
> > [C]ommon expression[s] which can indicate nothing but high quality surely would not be indicative of origin to the purchasing public.'
>
> See: Hiram Walker & Sons v. Penn-Maryland Corp., 79 F.2d 836, 28 USPQ 44 (2d Cir. 1935) ('Imperial'); Royal Silver Mfg. Co. v. National Silver Co., 61 F.Supp. 232, 65 USPQ 463 (S.D.N.Y., 1945) ('Royal'). 3 Callman, Unfair Competition and Trademarks §§69, 71.2 (2d ed. 1950). Compare In re Crosfield & Sons, Ltd., [1910] 1 ch. 130, 141-42.
> It is for this reason that such laudatory epithets are normally available to all the world, and are not entitled to trademark protection."

In Nebraska Consolidated Mills v. Shawnee Milling Company, 90 USPQ 303 (DC Okla., 1951), affirmed, 94 USPQ 19 (CA 10, 1952), the District Court observed, in dictum, that ". . . the words 'best' and 'pride' are of such general use and meaning that their exclusive use is not permissible commercially."

A Federal Court in New York considered it unnecessary to say more than, "As a laudatory word, 'exquisite' per se is entitled to no trademark protection," without citing any cases. Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 183 USPQ 666 (DC NY, 1974).

The expression "SMACKIN GOOD," as applied to various food products, was equated with the word "delicious" and held to be merely descriptive of the quality of the goods, on the authority of Burmel Handkerchief Corporation v. Cluett, Peabody & Company [cited also in Supreme Wine Co., Inc. v. American Distilling Co., supra] in In re National Tea Co., 166 USPQ 288 (TT&A Bd., 1970).

"ANOTHER DELICIOUS MARINE PROTEIN PRODUCT" was held to be merely descriptive of fish in In re Marine Protein Corporation, 183 USPQ 112 (TT&A Bd., 1974).

In the case of In re O. F. Mossberg & Sons, Inc., 175 USPQ 191, at 192 (TT&A Bd., 1972), in affirming the refusal of an application for registration of a mark on the Supplemental Register (for which a mark need be only capable of distinguishing goods, a lesser standard than a "trademark by which the goods of an applicant may be distinguished from the goods of others" as stated in §2 of the Act for marks registrable on the Principal Register), the Board said:

> ". . . [I]n order to be registrable on the Supplemental Register, a laudatory expression must have some degree of ingenuity or say something in a slightly different way from that expected to be said about a product [citations omitted]. In our opinion, the statement 'MORE

> GUN FOR THE MONEY' is a merely informational phrase which is compeltely devoid of imagination . . . [T]he wording in question is informational language which would lend itself to use by others in the sale of guns.
> It is concluded that 'MORE GUN FOR THE MONEY' is incapable of identifying applicant's goods and distinguishing them from the goods of others."

That is an example of an expression purporting to compare the value of an applicant's goods to the value of its competitors' goods being considered to be a mere laudatory expression and, as such, worse than merely descriptive and therefore incapable of distinguishing the applicant's goods.

[4] "AMERICA'S FAVORITE POPCORN!" and "AMERICA'S BEST POPCORN!" are also applicant's assessments of the popularity and quality of its popcorn in conparison with the popcorn of its competitors and, as such, are merely laudatory epithets descriptive of its goods which, in the absence of compelling proof of secondary meaning, are merely informational phrases (the information is merely applicant's claims for its popcorn) that the public would not regard as a symbol of a single source and which others are free to use.

In 1956, the Assistant Commissioner for Trademarks ordered the cancellation from the Supplemental Register (thereby holding that expression was not even capable of distinguishing the goods) of a registration for "AMERICA'S FINEST" for overalls, holding that ". . . the term 'AMERICA'S FINEST OVERALL' has been used by respondent as a laudatory phrase in advertising. It represents mere 'puffing' or 'touting' in advertising and seeking customers for its overalls, and on the basis of the record and as used, it neither identifies nor distinguishes respondent's products." Kotzin v. Levi Strauss & Company, 111 USPQ 161 (Comr., 1956).

Exactly the same opinion may be expressed on both of applicant's purported marks, "AMERICA'S BEST POPCORN!" and "AMERICA'S FAVORITE POPCORN!" They are merely laudatory epithets describing the claimed quality and popularity of applicant's product, for neither of which has any, let alone compelling, evidence of secondary meaning been shown.

Decision

The refusal of registration is affirmed in Serial No. 80,564 and in Serial No. 80,565.

CERTIFICATE OF SERVICE AND FILING

I hereby certifiy that on July 2, 2003, I caused the foregoing document to be delivered via Express Mail, as follows:

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I further certify that a diskette containing the text of this brief in .pdf format is being served herewith, after first being scanned for viruses and determined to be virus free.

Robyn Cocho
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New York, NY 10018

Exhibit 14

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-2065

American Italian Pasta Company,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Missouri.
New World Pasta Company,	*	
	*	
Appellant.	*	

Submitted: November 17, 2003
Filed: June 7, 2004

Before RILEY, RICHARD S. ARNOLD, and MELLOY, Circuit Judges.

RILEY, Circuit Judge.

"America's Favorite Pasta"–Commercial puffery or factual claim?

American Italian Pasta Company (American) sued New World Pasta Company (New World), seeking a declaratory judgment that American's use of the phrase "America's Favorite Pasta" does not constitute false or misleading advertising under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) (2000). New World counterclaimed, asserting American's use of "America's Favorite Pasta" violated the Lanham Act and many states' unfair competition laws. On summary judgment, the

district court[1] concluded American's use of "America's Favorite Pasta" did not violate the Lanham Act, dismissing New World's counterclaims and declining to exercise jurisdiction over New World's state law claims. We affirm.

I. BACKGROUND

From 1997 to 2000, American[2] manufactured Mueller's brand (Mueller's) dried pasta for Best Foods. In the fall of 2000, American purchased Mueller's and assumed all packaging, distributing, pricing, and marketing for the brand. Since purchasing Mueller's, American has placed the phrase "America's Favorite Pasta" on Mueller's packaging. On various packages, the phrases "Quality Since 1867," "Made from 100% Semolina," or "Made with Semolina" accompany the phrase "America's Favorite Pasta." The packaging also contains a paragraph in which the phrase "America's Favorite Pasta" appears. The paragraph states (1) pasta lovers have enjoyed Mueller's pasta for 130 years; (2) claims Mueller's "pasta cooks to perfect tenderness every time," because Mueller's uses "100% pure semolina milled from the highest quality durum wheat;" and (3) encourages consumers to "[t]aste why Mueller's is America's favorite pasta."

New World[3] sent American a letter demanding American cease and desist using the phrase "America's Favorite Pasta." Consequently, American filed this suit, requesting a declaration that its use of the phrase "America's Favorite Pasta" does not constitute false or misleading advertising under the Lanham Act. In its federal

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[1]The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

[2]American sells dried pasta under the brand names Mueller's, Golden Grain, Mrs. Grass, Ronco, Luxury, R & F, Global A1, Pennsylvania Dutch, and Anthony's.

[3]New World sells dried pasta under the brand names Ronzoni, San Giorgio, Skinner, American Beauty, Light n' Fluffy, Goodman, Mrs. Weiss, Prince, Creamette, Monder, Albadoro, Catelli, Lancia, and Ronzoni Canada.

counterclaim, New World asserted American's use of "America's Favorite Pasta" violated the Lanham Act. New World claims American's use of the phrase is false or misleading advertising, because, according to New World's consumer survey, the phrase conveys Mueller's is a national pasta brand or the nation's number one selling pasta. American and New World agree Barilla sells the most dried pasta in the United States and American's brands are regional.

American moved to dismiss New World's counterclaims, arguing the phrase "America's Favorite Pasta" constituted non-actionable puffery. New World resisted American's motion and filed a motion for partial summary judgment. The district court denied American's motion, concluding it would have to consider facts outside the pleadings to determine if the phrase "America's Favorite Pasta" constituted puffery. Two weeks later, the district court denied New World's motion for partial summary judgment, dismissed New World's Lanham Act counterclaim, and declined to exercise jurisdiction over New World's state law counterclaims. The district court concluded the phrase "America's Favorite Pasta" constitutes non-actionable puffery as a matter of law, and the phrase is not actionable under the Lanham Act. New World appeals, contending the phrase "America's Favorite Pasta" is not puffery, but is a deceptive factual claim.

II. DISCUSSION

We review the district court's summary judgment decision de novo. Interstate Cleaning Corp. v. Commercial Underwriters Ins. Co., 325 F.3d 1024, 1027 (8th Cir. 2003). A purpose of the Lanham Act is "to protect persons engaged in commerce against false advertising and unfair competition." United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998). To establish a false or deceptively misleading advertising claim under section 43(a) of the Lanham Act,[4] New World must establish:

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[4]Section 43(a) of the Lanham Act states, in pertinent part:

> (1) a false statement of *fact* by [American on its packaging] about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement.

Id. at 1180 (emphasis added). The failure to establish any element of the prima facie case is fatal. Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 495 (5th Cir. 2000).

Under section 43(a), two categories of actionable statements exist: (1) literally false factual commercial claims; and (2) literally true or ambiguous factual claims "which implicitly convey a false impression, are misleading in context, or [are] likely to deceive consumers." United Indus., 140 F.3d at 1180. Besides actionable statements, a category of non-actionable statements exists. Id. Many statements fall into this category, popularly known as puffery. Id. Puffery exists in two general

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> (1) Any person who, on or in connection with any goods . . . uses in commerce any . . . false or misleading description of *fact*, or false or misleading representation of *fact*, which –
>
> . . .
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (emphasis added).

forms: (1) exaggerated statements of bluster or boast upon which no reasonable consumer would rely; and (2) vague or highly subjective claims of product superiority, including bald assertions of superiority. Pizza Hut, 227 F.3d at 496-97; United Indus., 140 F.3d at 1180.

Juxtaposed to puffery is a factual claim. A factual claim is a statement that "(1) admits of being adjudged true or false in a way that (2) admits of empirical verification." Pizza Hut, 227 F.3d at 496 (quoting Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 679 (5th Cir. 1986)). To be actionable, the statement must be a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999); cf. United Indus., 140 F.3d at 1180 (noting puffery does not include "false descriptions of specific or absolute characteristics of a product and specific, measurable claims of product superiority"). Generally, opinions are not actionable. Coastal Abstract, 173 F.3d at 731.

Puffery and statements of fact are mutually exclusive. If a statement is a specific, measurable claim or can be reasonably interpreted as being a factual claim, i.e., one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery. Defining puffery broadly provides advertisers and manufacturers considerable leeway to craft their statements, allowing the free market to hold advertisers and manufacturers accountable for their statements, ensuring vigorous competition, and protecting legitimate commercial speech.

A. "America's Favorite Pasta" Standing Alone

The phrase "America's Favorite Pasta," standing alone, is not a statement of fact as a matter of law. The key term in the phrase "America's Favorite Pasta" is

"favorite." Used in this context, "favorite" is defined as "markedly popular especially over an extended period of time." Webster's Third New International Dictionary 830 (unabridged 1961). Webster's definition of "favorite" begs the question of how "popular" is defined. In this context, "popular" is defined as "well liked or admired by a particular group or circle." Id. at 1766. By combining the term "favorite" with "America's," American claims Mueller's pasta has been well liked or admired over time by America, a non-definitive person.[5]

"America's Favorite Pasta" is not a specific, measurable claim and cannot be reasonably interpreted as an objective fact. "Well liked" and "admired" are entirely subjective and vague. Neither the words "well liked" nor "admired" provide an empirical benchmark by which the claim can be measured. "Well liked" and "admired" do not convey a quantifiable threshold in sheer number, percentage, or place in a series. A product may be well liked or admired, but the product may not dominate in sales or market share. For example, assume a consumer's favorite cut of meat is beef tenderloin. If we were to look at the sheer amount of beef tenderloin our hypothetical consumer buys relative to other cuts of meat, beef tenderloin may not have a sizable market share or account for a significant percentage of the amount of money spent on meat. Therefore, we could not accurately determine whether beef tenderloin was the consumer's favorite cut of beef based on those benchmarks. The fact is, the consumer may admire beef tenderloin and like it best among beef cuts, but beef tenderloin is too expensive for our consumer to eat often. Likewise, sales volume and total dollars spent on particular pasta brands in the United States may not uncover America's favorite pasta.

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[5]We note the outcome of this case might be different if American claimed Mueller's pasta was the favorite pasta of a specific person or an identifiable group. Such a claim might be a statement of fact. For example, the claim that Mueller's is Judge Michael Melloy's favorite pasta would not be puffery. Such a statement is a factual statement that could be verified by simply asking Judge Melloy which pasta brand is his favorite.

"America's Favorite Pasta" also does not imply Mueller's is a national brand. First, "America's" is vague, and "America's," as well as "America" and "American" used in a similar context, is a broad, general reference. Second, a brand, chain, or product could be America's favorite without being national. For example, an individual restaurant or restaurant chain may be America's favorite, but may be located only in one or a few states. Although the restaurant chain may not be available nationally, consumers may prefer the restaurant because of its quality of food, quality of service, atmosphere, or some other attribute. Because "America's Favorite" depends on numerous characteristics, many of which may be intrinsic, a product (be it a restaurant, grits, or pasta) need not be sold nationally to be America's favorite.

B. "America's Favorite Pasta" Viewed In Context

Having decided the phrase "America's Favorite Pasta," standing alone, is not a statement of fact, we consider whether the context in which the phrase is used by American transforms it into a statement of fact. See Pizza Hut, 227 F.3d at 495 n.5 (noting the context in which a statement appears can be used to determine if the statement is actionable under the Lanham Act). "America's Favorite Pasta" appears on Mueller's packaging in two places. First, Mueller's packaging contains the phrase "America's Favorite Pasta" in the following paragraph (Paragraph):

> For over 130 years, pasta lovers have enjoyed the great taste of Mueller's. Our pasta cooks to perfect tenderness every time because it's made from 100% pure semolina milled from the highest quality durum wheat. Taste why Mueller's is America's favorite pasta.

Second, "America's Favorite Pasta" appears directly above "Quality Since 1867" on some packaging, and directly above "Made from 100% Semolina" or "Made with Semolina" on other packaging (Phrases).

The Paragraph and the Phrases fail to transform "America's Favorite Pasta" into a statement of fact. The Paragraph does not suggest a benchmark by which the veracity of American's statement can be verified. The Paragraph generally declares the brand has existed for 130 years, Mueller's tastes great, cooks to perfect tenderness, and is manufactured from high quality grain. We assume, *arguendo*, the sentence "Taste why Mueller's is America's favorite pasta" incorporates the attributes listed in the Paragraph into American's claim. Two attributes listed in the Paragraph are subject to verification: Mueller's is made from 100% pure semolina, and the brand is more than 130 years old. New World does not contend these claims are false. The remaining attributes listed in the Paragraph are unquantifiable and subject to an individual's fancy.

Notwithstanding the incorporation of these claims into "America's Favorite Pasta," the unverifiable attributes attenuate verifiable, and accurate, claims. "Taste why Mueller's is America's favorite pasta" suggests all of the attributes listed in the Paragraph are the reason Mueller's is "America's Favorite Pasta" and suggests each carries equal weight. The unquantifiable attributes coupled with two verifiable attributes do not render the phrase "America's Favorite Pasta" subject to verification.

Similarly, the Phrases do not convey a benchmark for "America's Favorite Pasta." The term "quality" is vague, entirely subjective, and a bare assertion of product superiority. In the context used, "quality" means "inherent or intrinsic excellence of character or type" or "superiority in kind." Webster's Third New International Dictionary 1858 (unabridged 1961). The only portion of "Quality Since 1867" that can be verified is "Since 1867," but "Since 1867" does not provide a methodology or a reason why Mueller's is America's favorite. The words simply state, accurately, when the brand was founded. Likewise, while presenting factual claims, the phrases "Made from 100% Semolina" and "Made with Semolina" do not define a methodology by which to ascertain the veracity of American's claim that

Mueller's is "America's Favorite Pasta." The two phrases simply, and correctly, list characteristics of the pasta.

C. Consumer Surveys

We now consider whether the results of New World's consumer survey transform the phrase "America's Favorite Pasta" into a specific, measurable claim. In its survey, New World asked consumers if the phrase "America's Favorite Pasta" conveyed a meaning. According to New World, thirty-three percent of those surveyed allegedly perceived the phrase "America's Favorite Pasta" to mean Mueller's is the number one brand. Fifty percent of those surveyed allegedly perceived the phrase "America's Favorite Pasta" to mean Mueller's is a national brand.

The Seventh Circuit confronted a similar question in Mead Johnson & Co. v. Abbott Laboratories, 201 F.3d 883 (7th Cir.), opinion amended on denial of reh'g, 209 F.3d 1032 (7th Cir. 2000). Having concluded the phrase "1st Choice of Doctors" conveyed more doctors prefer this product over its rivals, the Seventh Circuit considered whether a consumer survey can assign a different meaning to a phrase. Id. at 883-84. Mead Johnson's survey indicated consumers perceived the phrase "1st Choice of Doctors" to mean a majority of doctors. Concluding the district court erred in using the survey to assign such a meaning, the Seventh Circuit noted, "never before has survey research been used to determine the meaning of words, or to set the standard to which objectively verifiable claims must be held." Id. at 886. While acknowledging dictionaries are surveys by people who devote their entire lives to discovering the usage of words, the Seventh Circuit cogitated "[i]t would be a bad idea to replace the work of these professionals with the first impressions of people on the street." Id. The Seventh Circuit reasoned that using consumer surveys to determine the benchmark by which a claim is measured would remove otherwise useful words from products and would reduce ads and packaging to puffery. Id. at 886-87.

We agree with the Seventh Circuit. To allow a consumer survey to determine a claim's benchmark would subject any advertisement or promotional statement to numerous variables, often unpredictable, and would introduce even more uncertainty into the market place. A manufacturer or advertiser who expended significant resources to substantiate a statement or forge a puffing statement could be blind-sided by a consumer survey that defines the advertising statement differently, subjecting the advertiser or manufacturer to unintended liability for a wholly unanticipated claim the advertisement's plain language would not support. The resulting unpredictability could chill commercial speech, eliminating useful claims from packaging and advertisements. As the Seventh Circuit noted, the Lanham Act protects against misleading and false statements of fact, not misunderstood statements. Id. at 886.

III. CONCLUSION

For the foregoing reasons, we affirm.

Exhibit 15

774115

THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

July 20, 2005

THIS IS TO CERTIFY THAT ANNEXED IS A TRUE COPY FROM THE RECORDS OF THIS OFFICE OF THE TRADEMARK FILE WRAPPER AND CONTENTS OF:

TRADEMARK APPLICATION: ***78/136,708***
FILING DATE: ***June 18, 2002***

By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office

W. MONTGOMERY
Certifying Officer

Internet Transmission Date:
2002/06/18

Serial Number:
78136708

Filing Date:
2002/06/18

TRADEMARK APPLICATION

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

TOTAL FEES PAID: $325

RAM SALE NUMBER: 136
RAM ACCOUNTING DATE: 20020619

NO OCR

06-18-2002

DOCUMENT INFORMATION	
TRADEMARK/SERVICEMARK APPLICATION	
VERSION 1.24	
APPLICANT INFORMATION	
NAME	Barilla Alimentare S.p.A.
STREET	Via Mantova 166
CITY	Parma PR
COUNTRY	Italy
ZIP/POSTAL CODE	43100
APPLICANT ENTITY INFORMATION	
CORPORATION: STATE/COUNTRY OF INCORPORATION	Italy
TRADEMARK/SERVICEMARK INFORMATION	
MARK	BARILLA - AMERICA'S PREFERRED PASTA
TYPED FORM	Yes
BASIS FOR FILING AND GOODS/SERVICES INFORMATION	
INTENT TO USE: SECTION 1(b)	Yes
INTERNATIONAL CLASS NUMBER	030
LISTING OF GOODS AND/OR SERVICES	PASTA, PASTA PRODUCTS, SAUCES FOR PASTA
ATTORNEY INFORMATION	
NAME	G. Franklin Rothwell
STREET	1425 K Street, NW Suite 800

CITY	Washington
STATE	DC
COUNTRY	USA
ZIP/POSTAL CODE	20005
FIRM NAME	Rothwell, Figg, Ernst & Manbeck, P.C.
TELEPHONE NUMBER	202-783-6040
FAX NUMBER	202-783-6031
ATTORNEY DOCKET NUMBER	2778-132
OTHER APPOINTED ATTORNEY(S)	Anne M. Sterba; Robert H. Cameron
DOMESTIC REPRESENTATIVE FOR FOREIGN APPLICANT	
NAME	G. Franklin Rothwell
STREET	1425 K Street, NW Suite 800
CITY	Washington
STATE	DC
ZIP CODE	20005
FIRM NAME	Rothwell, Figg, Ernst & Manbeck, P.C.
TELEPHONE NUMBER	202-783-6040
FAX NUMBER	202-783-6031
FEE INFORMATION	
TOTAL FEES PAID	325
NUMBER OF CLASSES PAID	1
NUMBER OF CLASSES	1

LAW OFFICE INFORMATION	
E-MAIL ADDRESS FOR CORRESPONDENCE	N/A
SIGNATURE AND OTHER INFORMATION	
SIGNATURE	/Robert H. Cameron/
DATE	06/18/2002
NAME	Robert H. Cameron
TITLE	Attorney for Applicant
MAILING ADDRESS	
LINE	G. Franklin Rothwell
LINE	Rothwell, Figg, Ernst & Manbeck, P.C.
LINE	1425 K Street, NW
LINE	Suite 800
LINE	Washington DC 20005
RAM INFORMATION	
RAM SALE NUMBER	136
RAM ACCOUNTING DATE	20020619
SERIAL NUMBER INFORMATION	
SERIAL NUMBER	78/136708
INTERNET TRANSMISSION DATE	Tuesday, 06-18-2002 16:50:14 EDT
TEAS STAMP	USPTO-12150177130-20020618165023026-78/136708-124c59fb751b1b38bcda38f7aeedb856b55-RAM-136-20020618164923026
E-MAIL ADDRESS FOR	bmanning@rothwellfigg.com

ACKNOWLEDGMENT	

<SERIAL NUMBER> 78136708
<FILING DATE> 06/18/2002

<DOCUMENT INFORMATION>
<TRADEMARK/SERVICEMARK APPLICATION>
<VERSION 1.24>

<APPLICANT INFORMATION>

<NAME>	Barilla Alimentare S.p.A.
<STREET>	Via Mantova 166
<CITY>	Parma PR
<COUNTRY>	Italy
<ZIP/POSTAL CODE>	43100

<APPLICANT ENTITY INFORMATION>
<CORPORATION: STATE/COUNTRY OF INCORPORATION> Italy

<TRADEMARK/SERVICEMARK INFORMATION>
<MARK> BARILLA - AMERICA'S PREFERRED PASTA
<TYPED FORM> Yes
* Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). *

<BASIS FOR FILING AND GOODS/SERVICES INFORMATION>
<INTENT TO USE: SECTION 1(b)> Yes
* Applicant has a bona fide intention to use or use through a related company the mark in commerce on or in connection with the below-identified goods/services. (15 U.S.C. Section 1051(b), as amended.) *
<INTERNATIONAL CLASS NUMBER> 030
<LISTING OF GOODS AND/OR SERVICES> PASTA, PASTA PRODUCTS, SAUCES FOR PASTA

<ATTORNEY INFORMATION>

<NAME>	G. Franklin Rothwell
<STREET>	1425 K Street, NW Suite 800
<CITY>	Washington
<STATE>	DC
<COUNTRY>	USA
<ZIP/POSTAL CODE>	20005
<FIRM NAME>	Rothwell, Figg, Ernst & Manbeck, P.C.

<TELEPHONE NUMBER> 202-783-6040
<FAX NUMBER> 202-783-6031
<ATTORNEY DOCKET NUMBER> 2778-132
<OTHER APPOINTED ATTORNEY(S)> Anne M. Sterba; Robert H. Cameron

<DOMESTIC REPRESENTATIVE FOR FOREIGN APPLICANT>
* is hereby appointed applicant's representative upon whom notice or process in the proceedings affecting the mark may be served *
<NAME> G. Franklin Rothwell
<STREET> 1425 K Street, NW Suite 800
<CITY> Washington
<STATE> DC
<ZIP CODE> 20005
<FIRM NAME> Rothwell, Figg, Ernst & Manbeck, P.C.
<TELEPHONE NUMBER> 202-783-6040
<FAX NUMBER> 202-783-6031

<FEE INFORMATION>
<TOTAL FEES PAID> 325
<NUMBER OF CLASSES PAID> 1
<NUMBER OF CLASSES> 1

<LAW OFFICE INFORMATION>
<E-MAIL ADDRESS FOR CORRESPONDENCE> N/A

<SIGNATURE AND OTHER INFORMATION>
* PTO-Application Declaration: The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true. *
<SIGNATURE> /Robert H. Cameron/
<DATE> 06/18/2002

<NAME> Robert H. Cameron
<TITLE> Attorney for Applicant

<MAILING ADDRESS>
<LINE> G. Franklin Rothwell
<LINE> Rothwell, Figg, Ernst & Manbeck, P.C.
<LINE> 1425 K Street, NW
<LINE> Suite 800
<LINE> Washington DC 20005

<RAM INFORMATION>
<RAM SALE NUMBER> 136
<RAM ACCOUNTING DATE> 20020619

<SERIAL NUMBER INFORMATION>
<SERIAL NUMBER> 78/136708
<INTERNET TRANSMISSION DATE> Tuesday, 06-18-2002 16:50:14 EDT
<TEAS STAMP>
USPTO-12150177130-20020618165023026-78/136708-
124c59fb751b1b38bcda38f7aeedb856b55-RAM-136-20020618164923026
E-MAIL ADDRESS FOR ACKNOWLEDGMENT> bmanning@rothwellfigg.com

*** User: dspruill *** Serial Number: 78057808 *** 10/11/02 10:58:13 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE PIZZA FEAST

Pseudo Mark
AMERICAS FAVORITE PIZZA FEAST

Goods and Services
IC 030. US 046. G & S: Pizza for consumption on or off the premises.
FIRST USE: 19920427. FIRST USE IN COMMERCE: 19920427

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
78057808

Filing Date
April 11, 2001

Publication for Opposition Date
January 15, 2002

Registration Number
2558945

Registration Date
April 9, 2002

Owner Name and Address
(REGISTRANT) Domino's Pizza PMC, Inc. CORPORATION MICHIGAN 30 Frank Lloyd Wright Drive Ann Arbor MICHIGAN 48106

Prior Registration(s)
1705234;1791773;1825321;AND OTHERS

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMERICA'S FAVORITE PIZZA" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL

Live Dead Indicator
LIVE

Attorney of Record
Elizabeth F. Janda

*** Search: 14 *** Document Number: 2 ***

[Typed Drawing]

Mark
AMERICA'S FAVORITE COOKIE

Goods and Services
IC 030. US 046. G & S: Cookies. FIRST USE: 19980201. FIRST USE IN COMMERCE: 19980201

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
78039333

Filing Date
December 14, 2000

Filed ITU
FILED AS ITU

Supplemental Register Date
November 19, 2001

Registration Number
2572410

Registration Date
May 21, 2002

Owner Name and Address
(REGISTRANT) Nabisco Brands Company CORPORATION DELAWARE 1105 North Market Street, Suite 803 Wilmington DELAWARE 19801

Assignment Recorded
ASSIGNMENT RECORDED

Prior Registration(s)
2149887

Type of Mark
TRADEMARK

Register
SUPPLEMENTAL

Live Dead Indicator
LIVE

Attorney of Record
Kathleen J. Gallagher, Esq.

*** User: dspruill *** Serial Number: 75768708 *** 10/11/02 10:58:13 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE SOUR GUM

Pseudo Mark
AMERICAS FAVORITE SOUR GUM

Goods and Services
IC 030. US 046. G & S: BUBBLE GUM. FIRST USE: 19990615. FIRST USE IN COMMERCE: 19990615

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75768708

Filing Date
August 5, 1999

Supplemental Register Date
December 15, 1999

Registration Number
2347915

Registration Date
May 2, 2000

Owner Name and Address
(REGISTRANT) Philadelphia Chewing Gum Corporation CORPORATION PENNSYLVANIA Havertown PENNSYLVANIA 190832189

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SOUR GUM" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
SUPPLEMENTAL

Live Dead Indicator
LIVE

Attorney of Record
Harriet E. Perkins

*** Search: 14 *** Document Number: 4 ***

*** User: dspruill *** Serial Number: 75618178 *** 10/11/02 10:58:14 AM *

[Typed Drawing]

Mark
TUMARO'S GOURMET TORTILLAS -- AMERICA'SFAVORITE

Pseudo Mark
TUMAROS GOURMET TORTILLAS AMERICAS FAVORITE

Goods and Services
IC 030. US 046. G & S: tortillas and crepes. FIRST USE: 20000411. FIRST USE IN COMMERCE: 20000411

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75618178

Filing Date
January 11, 1999

Filed ITU
FILED AS ITU

Publication for Opposition Date
October 26, 1999

Registration Number
2419870

Registration Date
January 9, 2001

Owner Name and Address
(REGISTRANT) Tumaro's, Inc. CORPORATION CALIFORNIA 5300 Santa Monica Boulevard Los Angeles CALIFORNIA 90029

Prior Registration(s)
1893236;2133513

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GOURMET TORTILLAS- - AMERICA'S FAVORITE" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL

Live Dead Indicator
LIVE

Attorney of Record
Corrine M. Freeman

*** Search: 14 *** Document Number: 5 ***

*** User: dspruill *** Serial Number: 75538444 *** 10/11/02 10:58:14 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE

Pseudo Mark
AMERICAS FAVORITE

Goods and Services
IC 030. US 046. G & S: Doughnuts. FIRST USE: 19721003. FIRST USE IN COMMERCE: 19721201

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75538444

Filing Date
August 18, 1998

Publication for Opposition Date
April 27, 1999

Registration Number
2263243

Registration Date
July 20, 1999

Owner Name and Address
(REGISTRANT) HDN Development Corporation CORPORATION KENTUCKY 7303 Turfway Road Florence KENTUCKY 41042

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)

Live Dead Indicator
LIVE

Attorney of Record
JOHN M HARRINGTON

*** Search: 14 *** Document Number: 7 ***

Mark
AMERICA'S FAVORITE FOODS PRESTO

Pseudo Mark
AMERICAS FAVORITE FOODS PRESTO

Goods and Services
IC 030. US 046. G & S: pizza crust mix, garlic sauce and cheddar sauce. FIRST USE: 19920217. FIRST USE IN COMMERCE: 19920217

Mark Drawing Code
(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Code
261702 261707

Serial Number
75501805

Filing Date
June 15, 1998

Publication for Opposition Date
September 21, 1999

Registration Number
2299622

Registration Date
December 14, 1999

Owner Name and Address
(REGISTRANT) OHIO PIZZA PRODUCTS INC. CORPORATION OHIO 1522 Manchester Road Dayton OHIO 454490127

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMERICA'S FAVORITE FOODS" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL

Live Dead Indicator

*** User: dspruill *** Serial Number: 75501805 ***

LIVE

Attorney of Record
THEODORE D LIENESCH

*** Search: 14 *** Document Number: 8 ***

'*** 'User: dspruill *** Serial Number: 75470400 *** 10/11/02 10:58:14 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE CANDIES

Pseudo Mark
AMERICAS FAVORITE CANDIES

Goods and Services
IC 030. US 046. G & S: CANDY NOT INCLUDING JELLY BEANS. FIRST USE: 19851118. FIRST USE IN COMMERCE: 19851118

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75470400

Filing Date
April 20, 1998

Publication for Opposition Date
November 2, 1999

Registration Number
2359173

Registration Date
June 20, 2000

Owner Name and Address
(REGISTRANT) PROMOTION IN MOTION, INC. CORPORATION DELAWARE 3 REUTEN DRIVE CLOSTER NEW JERSEY 07624

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "CANDIES" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)

Live Dead Indicator
LIVE

Attorney of Record
RICHARD M GOLDBERG

*** Search: 14 *** Document Number: 9 ***

'*** 'User: dspruill *** Serial Number: 75447700 *** 10/11/02 10:58:15 AM *

[Typed Drawing]

Mark
BEST PIE IN AMERICA

Goods and Services
IC 030. US 046. G & S: PIES. FIRST USE: 19970100. FIRST USE IN COMMERCE: 19970100

IC 042. US 100 101. G & S: RESTAURANT SERVICES. FIRST USE: 19970100. FIRST USE IN COMMERCE: 19970100

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75447700

Filing Date
March 10, 1998

Supplemental Register Date
October 14, 1998

Registration Number
2239993

Registration Date
April 13, 1999

Owner Name and Address
(REGISTRANT) Vicorp Restaurants, Inc. CORPORATION COLORADO 400 West 48th Avenue Denver COLORADO 80216

Assignment Recorded
ASSIGNMENT RECORDED

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PIE" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK. SERVICE MARK

Register
SUPPLEMENTAL

Live Dead Indicator
LIVE

Attorney of Record
SABRINA C STAVISH

*** Search: 14 *** Document Number: 10 ***

Mark
BAKERS SQUARE BEST PIE IN AMERICA

Goods and Services
IC 030. US 046. G & S: pies. FIRST USE: 19970400. FIRST USE IN COMMERCE: 19970400

Mark Drawing Code
(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Code
010103 260117

Serial Number
75300090

Filing Date
May 29, 1997

Filed ITU
FILED AS ITU

Publication for Opposition Date
October 6, 1998

Registration Number
2213980

Registration Date
December 29, 1998

Owner Name and Address
(REGISTRANT) Vicorp Restaurants, Inc. CORPORATION COLORADO 400 West 48th Avenue Denver COLORADO 80216

Assignment Recorded
ASSIGNMENT RECORDED

*** User: dspruill *** Serial Number: 75300090 ***

Prior Registration(s)
1394236;1394428;1403328;2002503

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BEST PIE IN AMERICA" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)-IN PART

Live Dead Indicator
LIVE

Distinctiveness Limitation Statement
as to "BAKERS"

Attorney of Record
SABRINA C STAVISH

*** Search: 14 *** Document Number: 11 ***

'*** 'User: dspruill *** Serial Number: 75265223 *** 10/11/02 10:58:15 AM *

[Typed Drawing]

Mark
AMERICA'S BEST

Pseudo Mark
AMERICAS BEST

Goods and Services
IC 030. US 046. G & S: iced coffee-based beverages, namely, unflavored iced coffees and coffees with flavorings including cappuccino, hazelnut, French vanilla, Viennese mocha and original chocolate flavors. FIRST USE: 19930200. FIRST USE IN COMMERCE: 19930200

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75265223

Filing Date
March 27, 1997

Publication for Opposition Date
July 21, 1998

Registration Number
2194941

Registration Date
October 13, 1998

Owner Name and Address
(REGISTRANT) America's Best Beverage Company, Inc. CORPORATION FLORIDA 35 Mason Street Greenwich CONNECTICUT 06830

Assignment Recorded
ASSIGNMENT RECORDED

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)

Live Dead Indicator
LIVE

Attorney of Record
MICHAEL I WOLFSON

*** Search: 14 *** Document Number: 12 ***

*** User: dspruill *** Serial Number: 75222072 *** 10/11/02 10:58:16 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE CHOCOLATE CHIP COOKIE!

Pseudo Mark
AMERICAS FAVORITE CHOCOLATE CHIP COOKIE

Goods and Services
IC 030. US 046. G & S: cookies. FIRST USE: 19960400. FIRST USE IN COMMERCE: 19960400

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75222072

Filing Date
January 8, 1997

Filed ITU
FILED AS ITU

Supplemental Register Date
January 20, 1998

Registration Number
2149887

Registration Date
April 7, 1998

Owner Name and Address
(REGISTRANT) Nabisco Brands Company CORPORATION DELAWARE One South Wacker Drive, Suite 2740 Chicago ILLINOIS 60606

Assignment Recorded
ASSIGNMENT RECORDED

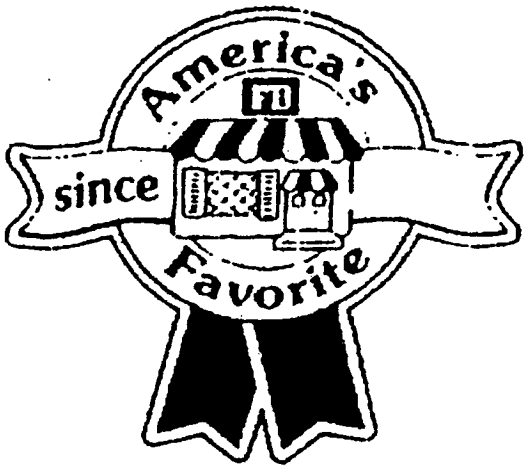
Type of Mark
TRADEMARK

Register
SUPPLEMENTAL

Live Dead Indicator
LIVE

Attorney of Record
KATHLEEN J GALLAGHER

*** Search: 14 *** Document Number: 13 ***



Mark
AMERICA'S FAVORITE SINCE FBI

Goods and Services
IC 030. US 046. G & S: confectionery, namely, candy, caramels, marshmallows, marshmallow creme, and fudge. FIRST USE: 19960700. FIRST USE IN COMMERCE: 19960700

Mark Drawing Code
(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Design Code
070104 240707 240907

Serial Number
75144931

Filing Date
August 5, 1996

Publication for Opposition Date
September 16, 1997

Registration Number
2119233

Registration Date
December 9, 1997

Owner Name and Address
(REGISTRANT) Favorite Brands International, Inc. CORPORATION DELAWARE 75 Tri State International Lincolnshire ILLINOIS 60069

Assignment Recorded
ASSIGNMENT RECORDED

Disclaimer Statement

*** User: dspruill *** Serial Number: 75144931 ***

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMERICA'S FAVORITE SINCE" APART FROM THE MARK AS SHOWN

Description of Mark
The mark consists of the design of a canopied building, with the stylized letters "FBI" appearing directly above the building, and the phrase "AMERICA'S FAVORITE SINCE" (followed by a date of origin, which varies from candy to candy), all being enclosed in a banner and seal-with-ribbon design. The lining in the drawing is a feature of the mark, and it is not intended to indicate color.

Type of Mark
TRADEMARK

Register
PRINCIPAL

Live Dead Indicator
LIVE

Attorney of Record
Paula J. Krasny

*** Search: 14 *** Document Number: 14 ***

*** User: dspruill *** Serial Number: 75116367 *** 10/11/02 10:58:17 AM *

[Typed Drawing]

Mark
IT'S AMERICA'S FAVORITE JELLY BEAN

Goods and Services
IC 030. US 046. G & S: jelly beans. FIRST USE: 19890531. FIRST USE IN COMMERCE: 19890531

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75116367

Filing Date
June 10, 1996

Publication for Opposition Date
April 15, 1997

Registration Number
2077329

Registration Date
July 8, 1997

Owner Name and Address
(REGISTRANT) HERMAN GOELITZ CANDY CO., INC. CORPORATION CALIFORNIA 2400 North Watney Way Fairfield CALIFORNIA 94533

Assignment Recorded
ASSIGNMENT RECORDED

Prior Registration(s)
1604190

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "JELLY BEAN" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)

Live Dead Indicator
LIVE

Attorney of Record
JAMES R. CYPHER

*** Search: 14 *** Document Number: 15 ***

*** User: dspruill *** Serial Number: 75068756 *** 10/11/02 10:58:17 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE KETCHUP

Pseudo Mark
AMERICAS FAVORITE KETCHUP

Goods and Services
IC 030. US 046. G & S: condiments, namely, ketchup. FIRST USE: 19920600. FIRST USE IN COMMERCE: 19920600

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75068756

Filing Date
March 7, 1996

Publication for Opposition Date
July 1, 1997

Registration Number
2098790

Registration Date
September 23, 1997

Owner Name and Address
(REGISTRANT) H. J. HEINZ COMPANY CORPORATION PENNSYLVANIA 1062 Progress Street Pittsburgh PENNSYLVANIA 15212

Assignment Recorded
ASSIGNMENT RECORDED

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "KETCHUP" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)

Live Dead Indicator
LIVE

Attorney of Record
Dean A. Bierkan

*** Search: 14 *** Document Number: 17 ***

*** User: dspruill *** Serial Number: 75036522 *** 10/11/02 10:58:17 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE SOFT PRETZEL

Goods and Services
IC 030. US 046. G & S: snack foods, namely, soft pretzels. FIRST USE: 19960300. FIRST USE IN COMMERCE: 19960300

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75036522

Filing Date
December 26, 1995

Filed ITU
FILED AS ITU

Publication for Opposition Date
February 17, 1998

Registration Number
2155994

Registration Date
May 12, 1998

Owner Name and Address
(REGISTRANT) J&J Snack Foods Corp. CORPORATION NEW JERSEY 6000 Central Highway Pennsauken NEW JERSEY 08109

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SOFT PRETZEL" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL-2(F)

Live Dead Indicator
LIVE

Attorney of Record
J. Rodman Steele, Jr.

*** Search: 14 *** Document Number: 18 ***

[Typed Drawing]

Mark
AMERICA'S #1 SPICE VALUE

Goods and Services
IC 030. US 046. G & S: spices. FIRST USE: 19950324. FIRST USE IN COMMERCE: 19950324

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
75035078

Filing Date
December 20, 1995

Publication for Opposition Date
March 11, 1997

Registration Number
2066497

Registration Date
June 3, 1997

Owner Name and Address
(REGISTRANT) ROSE SPICE, INC. CORPORATION DELAWARE 4500 Northchase Parkway NE Wilmington DELAWARE 28405

Assignment Recorded
ASSIGNMENT RECORDED

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMERICA'S #1 SPICE" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL

Live Dead Indicator
LIVE

Attorney of Record
WILLIAM J MASON

*** User: dspruill *** Serial Number: 74322961 *** 10/11/02 10:58:18 AM *

[Typed Drawing]

Mark
AMERICA'S FAVORITE HOLIDAY CANDY

Pseudo Mark
AMERICAS FAVORITE HOLIDAY CANDY

Goods and Services
IC 030. US 046. G & S: chocolates and other candy. FIRST USE: 19921201. FIRST USE IN COMMERCE: 19921201

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
74322961

Filing Date
October 15, 1992

Filed ITU
FILED AS ITU

Supplemental Register Date
December 14, 1993

Registration Number
1837304

Registration Date
May 17, 1994

Owner Name and Address
(REGISTRANT) R. M. PALMER COMPANY CORPORATION PENNSYLVANIA 77 Second Avenue West Reading PENNSYLVANIA 19611

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "HOLIDAY CANDY" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
SUPPLEMENTAL

Affidavit Text
SECT 8 (6-YR).

Live Dead Indicator
LIVE

Attorney of Record
John F. McNulty

*** Search: 14 *** Document Number: 21 ***

America's Favorite Pizza Feast

Mark
AMERICA'S FAVORITE PIZZA FEAST

Pseudo Mark
AMERICAS FAVORITZ PIZZA FEAST

Goods and Services
IC 030. US 046. G & S: pizza for consumption on or off the premises.
FIRST USE: 19920427. FIRST USE IN COMMERCE: 19920427

Mark Drawing Code
(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM

Serial Number
74270458

Filing Date
April 29, 1992

Filed ITU
FILED AS ITU

Publication for Opposition Date
December 15, 1992

Registration Number
1791773

Registration Date
September 7, 1993

Owner Name and Address
(REGISTRANT) Domino's Pizza, Inc. CORPORATION MICHIGAN 30 Frank Lloyd Wright Drive P.O. Box 997 Ann Arbor MICHIGAN 481060997

Assignment Recorded
ASSIGNMENT RECORDED

Prior Registration(s)
1700700

Disclaimer Statement
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMERICA'S FAVORITE PIZZA" APART FROM THE MARK AS SHOWN

Type of Mark
TRADEMARK

Register
PRINCIPAL

*** User: dspruill *** Serial Number: 74270458 ***

Affidavit Text
SECT 15. SECT 8 (6-YR).

Live Dead Indicator
LIVE

Attorney of Record
JEFFREY P THENNISCH

*** Search: 14 *** Document Number: 22 ***

User: dspruill *** Serial Number: 74044195 *** 10/11/02 10:58:19 AM *

[Typed Drawing]

Mark
AMERICA'S SNACK FAVORITE

Pseudo Mark
americas snack favorite

Goods and Services
IC 030. US 046. G & S: snack cakes. FIRST USE: 19891200. FIRST USE IN COMMERCE: 19891200

Mark Drawing Code
(1) TYPED DRAWING

Serial Number
74044195

Filing Date
March 30, 1990

Supplemental Register Date
November 14, 1990

Registration Number
1638019

Registration Date
March 12, 1991

Owner Name and Address
(REGISTRANT) McKee Baking Company CORPORATION TENNESSEE P.O. Box 750 Collegedale TENNESSEE 37315

(LAST LISTED OWNER) MCKEE FOODS CORPORATION CORPORATION BY CHANGE OF NAME FROM TENNESSEE P.O. BOX 750 COLLEGEDALE TENNESSEE 373150750

Assignment Recorded
ASSIGNMENT RECORDED

Prior Registration(s)
1542109

Type of Mark
TRADEMARK

Register
SUPPLEMENTAL

Affidavit Text
SECT 8 (6-YR). SECTION 8(10-YR) 20010618.

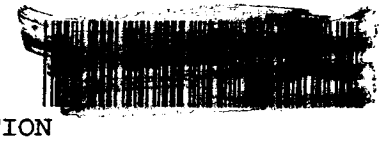
Renewal
1ST RENEWAL 20010618

Live Dead Indicator

Internet Transmission Date:
2002/06/18

Serial Number:
78136708

Filing Date:
2002/06/18



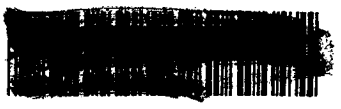
TRADEMARK APPLICATION

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
FEE RECORD SHEET

TOTAL FEES PAID: $325

RAM SALE NUMBER: 136
RAM ACCOUNTING DATE: 20020619

NO OCR



06-18-2002

<SERIAL NUMBER> 78136708
<FILING DATE> 06/18/2002

<DOCUMENT INFORMATION>
<TRADEMARK/SERVICEMARK APPLICATION>
<VERSION 1.24>

<APPLICANT INFORMATION>

<NAME>	Barilla Alimentare S.p.A.
<STREET>	Via Mantova 166
<CITY>	Parma PR
<COUNTRY>	Italy
<ZIP/POSTAL CODE>	43100

<APPLICANT ENTITY INFORMATION>
<CORPORATION: STATE/COUNTRY OF INCORPORATION> Italy

<TRADEMARK/SERVICEMARK INFORMATION>
<MARK> BARILLA - AMERICA'S PREFERRED PASTA
<TYPED FORM> Yes
* Applicant requests registration of the above-identified trademark/service mark in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq., as amended). *

<BASIS FOR FILING AND GOODS/SERVICES INFORMATION>
<INTENT TO USE: SECTION 1(b)> Yes
* Applicant has a bona fide intention to use or use through a related company the mark in commerce on or in connection with the below-identified goods/services. (15 U.S.C. Section 1051(b), as amended.) *
<INTERNATIONAL CLASS NUMBER> 030
<LISTING OF GOODS AND/OR SERVICES> PASTA, PASTA PRODUCTS, SAUCES FOR PASTA

<ATTORNEY INFORMATION>

<NAME>	G. Franklin Rothwell
<STREET>	1425 K Street, NW Suite 800
<CITY>	Washington
<STATE>	DC
<COUNTRY>	USA
<ZIP/POSTAL CODE>	20005
<FIRM NAME>	Rothwell, Figg, Ernst & Manbeck, P.C.
<TELEPHONE NUMBER>	202-783-6040

<FAX NUMBER> 202-783-6031
<ATTORNEY DOCKET NUMBER> 2778-132
<OTHER APPOINTED ATTORNEY(S)> Anne M. Sterba; Robert H. Cameron

<DOMESTIC REPRESENTATIVE FOR FOREIGN APPLICANT>
* is hereby appointed applicant's representative upon whom notice or process in the proceedings affecting the mark may be served *

<NAME>	G. Franklin Rothwell
<STREET>	1425 K Street, NW Suite 800
<CITY>	Washington
<STATE>	DC
<ZIP CODE>	20005
<FIRM NAME>	Rothwell, Figg, Ernst & Manbeck, P.C.
<TELEPHONE NUMBER>	202-783-6040
<FAX NUMBER>	202-783-6031

<FEE INFORMATION>
<TOTAL FEES PAID> 325
<NUMBER OF CLASSES PAID> 1
<NUMBER OF CLASSES> 1

<LAW OFFICE INFORMATION>
<E-MAIL ADDRESS FOR CORRESPONDENCE> N/A

<SIGNATURE AND OTHER INFORMATION>
* PTO-Application Declaration: The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true. *

<SIGNATURE>	/Robert H. Cameron/
<DATE>	06/18/2002
<NAME>	Robert H. Cameron
<TITLE>	Attorney for Applicant

<MAILING ADDRESS>
<LINE> G. Franklin Rothwell
<LINE> Rothwell, Figg, Ernst & Manbeck, P.C.
<LINE> 1425 K Street, NW
<LINE> Suite 800
<LINE> Washington DC 20005

<RAM INFORMATION>
<RAM SALE NUMBER> 136
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<SERIAL NUMBER INFORMATION>
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124c59fb751b1b38bcda38f7aeedb856b55-RAM-136-20020618164923026
E-MAIL ADDRESS FOR ACKNOWLEDGMENT> bmanning@rothwellfigg.com

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/136708

OCT 15 2002

APPLICANT: Barilla Alimentare S.p.A.

CORRESPONDENT ADDRESS:
G. Franklin Rothwell
Rothwell, Figg, Ernst & Manbeck, P.C.
1425 K Street, NW
Suite 800
Washington DC 20005

RETURN ADDRESS:
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513
ecom101@uspto.gov

MARK: BARILLA - AMERICA'S PREFERRED PASTA

CORRESPONDENT'S REFERENCE/DOCKET NO: 2778-132

CORRESPONDENT EMAIL ADDRESS:
N/A

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

PRIORITY ACTION

OFFICE SEARCH: The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP section 704.02.

TO AVOID ABANDONMENT, WE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF OUR MAILING OR E-MAILING DATE. This case will be given priority as an amended case if you respond to the requirements stated below within two months.

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY.

RE: Serial Number 78/136708

The following issues were discussed in communication with G. Franklin Rothwell on 10/11/02.

1. **IDENTIFICATION OF GOODS -UNACCEPTABLE:**
The identification of goods is indefinite because the applicant uses the wording "products." The identification of goods must be specific. The applicant must amend the identification to specify the common commercial name of the goods or to indicate their nature. The recitation identification must be all-inclusive. The applicant should amend the identification to replace this wording with "namely." The applicant may amend the identification to substitute the following wording, if

accurate: **"Pasta, pasta products, namely, [specify the products], sauces for pasta," in International Class 030.** 37 C.F.R. Section 2.71(a); TMEP sections 804 and 804.08(c).[1]

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(a); TMEP section 804.09. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

2. DISCLAIMER REQUIREMENT:

The applicant must disclaim the wording AMERICA'S **PREFERRED** PASTA in the mark because the wording AMERICA'S is a term having geographical significance combined with **PREFERRED** a laudatory descriptive term, and PASTA a generic term .

Also, the examining attorney has attached third-party registrations showing the term **AMERICA('S)** combined with laudatory and generic terms disclaimed. *See* the attached enclosure. Third-party registrations are probative to the extent of demonstrating "that a mark or a portion thereof is suggestive or descriptive of certain goods and/or services and hence is entitled to a narrow scope of protection; properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used." *See* TMEP section 1207.01(c)(iv); *see also*, e.g., Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 917, 189 USPQ 693, 694-95 (C.C.P.A. 1975); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991); In re Dayco Products-Eaglemotive Inc., 9 USPQ2d 1910, 1911 (TTAB 1988); In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987); United Foods Inc. v. J.R. Simplot Co., 4 USPQ2d 1172, 1174 (TTAB 1987).

The computerized printing format for the *Trademark Official Gazette* requires a standard form for a disclaimer. TMEP section 1213.09(a)(i). A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use **"AMERICA'S PREFERRED PASTA"** apart from the mark as shown.

Darryl M. Spruill
Trademark Attorney
Law Office 101
(703) 308-9101, Ext. 170
darryl.spruill@uspto.gov

[1] Please note that the recommended identification of goods is not exhaustive. The applicant is directed to the Office's searchable database of the Manual of Acceptable Identifications of Goods and Services. The address for this is: **http://www.uspto.gov/web/offices/tac/doc/gsmanual/**.

How to respond to this Office Action:

To respond formally using the Office's Trademark Electronic Application System (TEAS), visit **http://www.uspto.gov/teas/index.html** and follow the instructions.

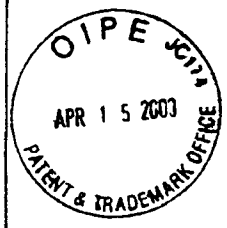
To respond formally via E-mail, visit **http://www.uspto.gov/web/trademarks/tmelecresp.htm** and follow the instructions.

To respond formally via regular mail, your response should be sent to the mailing Return Address listed above and include the serial number, law office and examining attorney's name on the upper right corner of each page of your response.

To check the status of your application at any time, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at **http://tarr.uspto.gov/**

For general and other useful information about trademarks, you are encouraged to visit the Office's web site at **http://www.uspto.gov/main/trademarks.htm**

2778-132
GFR:RHC:czb



Examining Attorney: SPRUILL, DA[redacted]L
Serial Number: 78/136708
[redacted]

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of	)	
	)	
Barilla Alimentare S.p.A.	)	
	)	
Serial No. 78/136,708	)	Trademark Attorney
	)	Darryl M. Spruill
Filed: June 18, 2002	)	
	)	Law Office 101
Mark: BARILLA - AMERICA'S PREFERRED PASTA	)	

AMENDMENT AND RESPONSE

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Dear Sir:

Applicant hereby responds to Office Action No. 01 in accordance with the headings therein.

IN THE IDENTIFICATION OF GOODS

Kindly amend the identification of goods in the subject application as follows:

> --PASTA, PASTA PRODUCTS, NAMELY MEALS CONSISTING PRIMARILY OF PASTA, MACARONI SALAD, PASTA SALAD, SAUCES FOR PASTA in International Class 30.--

DISCLAIMER REQUIREMENT

The Office Action has called for Applicant to disclaim the wording "AMERICA'S PREFERRED PASTA" apart from the mark as shown. The grounds cited are that AMERICA'S has geographical significance, PREFERRED is a laudatory term and PASTA is a

generic term for the goods. The Trademark Manual of Examining Procedure informs that the Office has discretion to require an Applicant to disclaim unregisterable components of a mark otherwise registerable, such as matter that is generic or merely descriptive or primarily geographically descriptive of the goods or services. See TMEP §§ 1213.01(a), 1213.03(a).

Although Applicant disagrees with the conclusion in the Office Action that the term AMERICA'S is geographically descriptive and does not concede that the term PREFERRED is laudatory in this instance, Applicant respectfully traverses the requirement to disclaim AMERICA'S PREFERRED PASTA on different grounds. Applicant submits that its proposed mark is a slogan clearly designed to identify and distinguish its pasta and pasta products from those of others. See Conde Nast Publications Inc. v. Redbook Publishing Co., 217 U.S.P.Q. 356, 360 (TTAB 1983)("A slogan or any other combination of words is capable of being a trademark if used in such a manner as to identify and distinguish the seller's goods and services from those of others."). The slogan incorporates Applicant's separate registered trademark, BARILLA[1], but obviously creates a commercial impression distinct from that of its house mark. Professor McCarthy provides an

---

[1] See, e.g., U.S. Registration Nos. 897,460; 2,022,842; 2,074,319; 2,005,752; 2,657,872.

illustrative example of such slogans, e.g., "You are in good hands with Allstate." J. Thomas McCarthy, 1 McCarthy on Trademarks and Unfair Competition, § 7:21(4th Ed. 2000).

According to the Trademark Manual of Examining Procedure, registerable slogans are "considered unitary and should not be broken up for purposes of requiring a disclaimer." See TMEP § 1213.05(b); accord Dena Corp. v.Belvedere Int'l, Inc., 950 F.2d 1555, 1560 (Fed. Cir. 1991)("A unitary mark cannot be separated into registerable and non-registerable parts. Because unitary marks do not fit within the language of [15 U.S.C. §§ 1056 and 1057], the Commissioner cannot require a disclaimer.").

There can be no doubt that Applicant's proposed slogan is a unitary mark. Unitary marks create a single and distinct commercial impression apart from their constituent elements. Dena, 950 F.2d at 1561. Here, Applicant's separate registered mark BARILLA is incontestable and has acquired secondary meaning based on extensive and continuous use for more than 30 years, and said mark is physically connected to AMERICA'S PREFERRED PASTA by virtue of a hyphen such that each of the constituent elements of the slogan appear side by side on the same line. Moreover, the words AMERICA'S PREFERRED PASTA clearly characterize the well-recognized trademark of Applicant -- in order words, they meld with the BARILLA registered mark. All of these factors support a

determination that Applicant's proposed slogan is a unitary mark. See Dena, 950 F.2d at 1561 (citing TMEP § 807.13(a)(rev. 1986)). For the foregoing reasons, Applicant believes that disclaimer of AMERICA'S PREFERRED PASTA is inappropriate.

In view of the foregoing remarks, it is respectfully requested that the subject application be approved for publication.

Respectfully submitted,

By Robert H. Cameron

G. Franklin Rothwell
Robert H. Cameron
Attorneys for Applicant
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
Suite 800, 1425 K Street, N.W.
Washington, D.C. 20005
Telephone: (202)783-6040

2778-132.amend&resp.wpd

2778-132
GRF:mec:nf

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of Barilla Alimentare S.p.a.	)	
Serial No. 78/136,708	)	Trademark Attorney Darryl M. Spruill
Filed: June 18, 2003	)	
	)	Law Office 112
Mark: BARILLA-AMERICA'S PREFERRED PASTA	)	

RESPONSE TO OFFICE ACTION

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

Dear Sir:

In response to the final refusal mailed June 18, 2003, Applicant responds in accordance with the headings therein.

DISCLAIMER

Please enter the following disclaimer:

-- No claim is made to the exclusive right to use "**AMERICA'S PREFERRED PASTA**" apart from the mark as shown.--

REMARKS

Since this appears to be the only outstanding matter at issue, it appears this application is in condition to be approved for publication.

Serial No.: 78/136,708
Mark: BARILLA - AMERICA'S PREFERRED PASTA
Attorney Docket No.: 2778-132

Respectfully submitted,

Barilla Alimentare S.p.A.

By: G. F. Rothwell

G. Franklin Rothwell
Attorney for Applicant
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
Suite 800, 1425 K Street, N.W.
Washington, D.C. 20005
Telephone: (202)783-6040

Examining Attorney: SPRUILL, DARRYL
Serial Number: 78/136708

[redacted]

2778-132
GFR:RHC:czb

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of	
Barilla Alimentare S.p.A.	
Serial No. 78/136,708	Trademark Attorney Darryl M. Spruill
Filed: June 18, 2002	
Mark: BARILLA - AMERICA'S PREFERRED PASTA	Law Office 101

AMENDMENT AND RESPONSE

Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Dear Sir:

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IN THE IDENTIFICATION OF GOODS

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generic term for the goods. The Trademark Manual of Examining Procedure informs that the Office has discretion to require an Applicant to disclaim unregisterable components of a mark otherwise registerable, such as matter that is generic or merely descriptive or primarily geographically descriptive of the goods or services. See TMEP §§ 1213.01(a), 1213.03(a).

Although Applicant disagrees with the conclusion in the Office Action that the term AMERICA'S is geographically descriptive and does not concede that the term PREFERRED is laudatory in this instance, Applicant respectfully traverses the requirement to disclaim AMERICA'S PREFERRED PASTA on different grounds. Applicant submits that its proposed mark is a slogan clearly designed to identify and distinguish its pasta and pasta products from those of others. See Conde Nast Publications Inc. v. Redbook Publishing Co., 217 U.S.P.Q. 356, 360 (TTAB 1983)("A slogan or any other combination of words is capable of being a trademark if used in such a manner as to identify and distinguish the seller's goods and services from those of others."). The slogan incorporates Applicant's separate registered trademark, BARILLA[1], but obviously creates a commercial impression distinct from that of its house mark. Professor McCarthy provides an

---

[1] See, e.g., U.S. Registration Nos. 897,460; 2,022,842; 2,074,319; 2,005,752; 2,657,872.

illustrative example of such slogans, e.g., "You are in good hands with Allstate." J. Thomas McCarthy, 1 McCarthy on Trademarks and Unfair Competition, § 7:21(4th Ed. 2000).

According to the Trademark Manual of Examining Procedure, registerable slogans are "considered unitary and should not be broken up for purposes of requiring a disclaimer." See TMEP § 1213.05(b); accord Dena Corp. v.Belvedere Int'l, Inc., 950 F.2d 1555, 1560 (Fed. Cir. 1991)("A unitary mark cannot be separated into registerable and non-registerable parts. Because unitary marks do not fit within the language of [15 U.S.C. §§ 1056 and 1057], the Commissioner cannot require a disclaimer.").

There can be no doubt that Applicant's proposed slogan is a unitary mark. Unitary marks create a single and distinct commercial impression apart from their constituent elements. Dena, 950 F.2d at 1561. Here, Applicant's separate registered mark BARILLA is incontestable and has acquired secondary meaning based on extensive and continuous use for more than 30 years, and said mark is physically connected to AMERICA'S PREFERRED PASTA by virtue of a hyphen such that each of the constituent elements of the slogan appear side by side on the same line. Moreover, the words AMERICA'S PREFERRED PASTA clearly characterize the well-recognized trademark of Applicant -- in order words, they meld with the BARILLA registered mark. All of these factors support a

determination that Applicant's proposed slogan is a unitary mark. See Dena, 950 F.2d at 1561 (citing TMEP § 807.13(a)(rev. 1986)). For the foregoing reasons, Applicant believes that disclaimer of AMERICA'S PREFERRED PASTA is inappropriate.

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Respectfully submitted,

By Robert H. Cameron

G. Franklin Rothwell
Robert H. Cameron
Attorneys for Applicant
ROTHWELL, FIGG, ERNST & MANBECK, P.C.
Suite 800, 1425 K Street, N.W.
Washington, D.C. 20005
Telephone: (202)783-6040

2778-132.amend&resp.wpd

Incoming Correspondence Routing Sheet

To: TMO LAW OFFICE 112 - AWAITING RESPONSE DOCKET

Word Mark: BARILLA - AMERICA'S PREFERRED PASTA

3A

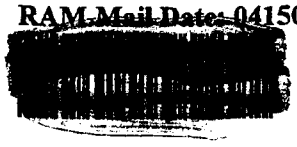
Serial No: 78136708

Mail Date: 04152003

Doc. Type: Amendments to Response

No Fee

RAM Mail Date: 041503



SL

5 of 16 DOCUMENTS

The Record (Bergen County, NJ)

February 3, 1999; WEDNESDAY; ALL EDITIONS

SECTION: LIFESTYLE / FOOD; Pg. F06

LENGTH: 449 words

HEADLINE: SAUCE IT UP, VEGAN STYLE

COLUMN: NATURALLY YOURS

BYLINE: JAN WOLFF

BODY:

...your spaghetti, and if you're a vegan, you may still crave a sprinkling of Parmesan now and then. What's left to put on **America's favorite pasta?** Plain old tomato sauce can get tiresome, even if you spruce it up with some mushrooms or other veggies.

If ...

6 of 16 DOCUMENTS

PR Newswire

April 24, 1998, Friday

SECTION: Financial News

DISTRIBUTION: TO FOOD, NATIONAL AND FEATURES EDITORS

LENGTH: 301 words

HEADLINE: Coming Soon to a Country Near You! 'World Pasta Day' Set for October 25, 1998**LEXIS-NEXIS Related Topics** Full Article Related Topics Overview

This document contains no targeted Topics.

DATELINE: NEW YORK, April 24

BODY:
...Pasta Association will commemorate World Pasta Day by announcing America's most popular pasta dish. "The selection of **America's favorite pasta** dish is based on consumer research as well as pasta's history in the U.S.," said Jula Kinnaird, president of the National ...

7 of 16 DOCUMENTS

Pittsburgh Post-Gazette (Pennsylvania)

April 2, 1995, Sunday, FIVE STAR EDITION

SECTION: FOOD, Pg. J10

LENGTH: 475 words

HEADLINE: Beard awards nominees

BODY:
...Vegetable Cookbook" by Lorraine Bodger; "Onions, Onions, Onions" by Linda and Fred Griffith; "Joie Warner's Spaghetti, **America's Favorite Pasta**' by Joie Warner.

General interest: "Now You're Cooking: Everything A Beginner Needs To Know To Start Cooking ...

8 of 16 DOCUMENTS

Orlando Sentinel (Florida)

January 22, 1995 Sunday, 3 STAR

Orlando Sentinel Tribune, January 22, 1995

SECTION: FLORIDA; Pg. 18

LENGTH: 861 words

HEADLINE: FOR YOUNG TASTE BUDS ONLY

BYLINE: By Scott Joseph, Sentinel Restaurant Critic

BODY:

...someplace else, but your kids will eat this place up. Heck, even the name is baby talk for **Americas favorite pasta.**

Spageddies is the latest chain to enter the Central Florida market. Although it is new, you likely have seen other places like ...

10 of 16 DOCUMENTS

Arkansas Democrat-Gazette (Little Rock, AR)

December 1, 1994, Thursday

SECTION: FEATURES; Pg. 3E

LENGTH: 806 words

HEADLINE: AS HOLIDAY SEASON APPROACHES, BRACE UP FOR A BEVY OF SPECIALS

BYLINE: Michael Storey

BODY:

...seasonal music.

Also on Dec. 14, "A Garfield Christmas Special" (7 p.m., Channel 11) will return with **America's favorite pasta**-eating cat going to the country with Jon for an old-fashioned Christmas.

The cartoon first aired on Dec. ...

13 of 16 DOCUMENTS

Los Angeles Times

September 7, 1994, Wednesday, Orange County Edition

SECTION: Business; Part D; Page 1; Column 2; Financial Desk

LENGTH: 924 words

HEADLINE: FARMERS COUNT ON A NEW CASH CROP: PASTA; AGRICULTURE: IRVINE GROUP IS MARKETING FOODS PROCESSED BY NORTH DAKOTA WHEAT GROWERS. GOAL IS TO CUT OUT MIDDLEMAN.

BYLINE: By GREG JOHNSON, TIMES STAFF WRITER

DATELINE: IRVINE

BODY:

...plant. We can grow it, mill it and send it through the noodle plant."

Pasta Popularity

Spaghetti and linguine are **America's favorite pasta** products, followed by elbows and twists. Dry pasta retail sales by shape in 1993:
Long goods (...

16 of 16 DOCUMENTS

Business Dateline;

Business First-Louisville

July 8, 1985

SECTION: Vol 1; No 48; Sec 1; pg 8

LENGTH: 1098 words

HEADLINE: Visitors Can't 'Kuwait' to Try Recipes Learned in Louisville

BYLINE: Connie Dorval

DATELINE: Louisville; KY; US

BODY:

...El Houssinez, Khaled Al-Mail and Zainab Abdul Rahim are learning how to make gallons of Italian spaghetti. And while **America's favorite pasta** may not be typical fare back in Kuwait, the three will be taking home some valuable recipes -- management ...

JOURNAL-CODE: BFL

TRADEMARK EXAMINATION WORKSHEET

☑ AMENDMENT STAGE ☐ NO CHANGE ☐ PUBLICATION/REGISTRATION STAGE

Name: Lorri White L.O. 112 Serial No. 78/136708

INSTRUCTIONS: Place a check mark in the appropriate column and/or box to indicate which data elements have been amended/coded.

Legal Instrument Examiner (LIE)

	Amended	Data Element	
Class Data	✓	☐ Prime/International Class	☐ Goods and Services
		☐ First Use Date	☐ First Use in Commerce Date
		☐ In Another Form	☐ Certification
		☐ 1b	
Mark Data		☐ Word Mark	☐ Pseudo Mark
		☐ Mark Drawing Code	☐ Design Search Code
		☐ Scan Sub Drawing	
Misc. Mark Data		☐ Mark Description	☐ Disclaimer
		☐ Lining/Stippling	☐ Name/Portrait/Consent
		☐ Translation	
Section 2(f)		☐ Section 2(f) Entire Mark	
		☐ Section 2(f) Limitation Statement	☐ Section 2(f) in Part
		☐ Amended Register	☐ Amended Register Date
Foreign Reg. Data		☐ Foreign Country	☐ 44(d)
		☐ Foreign Application Number	☐ Foreign Application Filing Date
		☐ Foreign Registration Number	☐ Foreign Registration Date
		☐ Foreign Registration Expiration Date	☐ Foreign Renewal Reg. Number
		☐ Foreign Reg. Renewal Expiration Date	☐ Foreign Renewal Reg. Date
Owner Data		☐ Owner Name	☐ DBA/AKA/TA
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		☐ Zip Code	
		☐ Citizenship	☐ Entity
		☐ Entity Statement	☐ Composed of
		☐ Assignment(s)/Name Change	
Amd/Corr Restr.		☐ Concurrent Use	
Prior U.S. Reg.		☐ Prior Registration	
Correspondence		☐ Attorney	☐ Domestic Representative
		☐ Attorney Docket Number	
		☐ Correspondence Firm Name/Address	

I certify that all corrections have been entered in accordance with text editing guidelines.

Lorri White
LIE

5/ 7 /2003
DATE

Other: _____

25 of 25 DOCUMENTS

Newsday (New York)

August 12, 1988, Friday, CITY EDITION

SECTION: WEEKEND; Pg. 38

LENGTH: 226 words

HEADLINE: TIDBITS: Chicken

BYLINE: Peggy Katalinich

BODY:

...dark-sweet vinegar and rosemary. The calamari is fried tender in a light batter, and the penne with eggplant, mozzarella and tomato is the **preferred pasta.** The only problem with lunch is that the kitchen is still preparing the desserts; stick with fresh fruit and cappuccino.

Sun-Sentinel (Fort Lauderdale, FL) August 1, 1999, Sunday,

LENGTH: 1366 words

HEADLINE: CULIANAROS: A GREEK ODYSSEY

BYLINE: BY JUDITH STOCKS

BODY:
...restaurant, Culinaros, in 1997, Vogiatzis spent a lot of time adapting those family recipes to American tastes.

"Americans **preferred pastas** cooked softer," he says, diplomatically, .and heavier sauces."

13 of 25 DOCUMENTS

St. Petersburg Times (Florida)

November 19, 1998, Thursday, 0 South Pinellas Edition

SECTION: FOOD; TIDBITS; TASTE; Pg. 6D

LENGTH: 584 words

HEADLINE: TIDBITS

BODY:
...a flat noodle), "losyns" (lasagna) and "papdele." The last name has puzzled historians, though it's clearly pappardelle, still the **preferred pasta** to go with hare in Italy, as it was in 14th century England. English ravioli goes back even a ...

15 of 25 DOCUMENTS

Buffalo News (New York)

May 11, 1997, Sunday, FINAL EDITION

Buffalo News (New York) May 11, 1997, Sunday, FINAL EDITION

SECTION: VIEWPOINTS, Pg. 3H

LENGTH: 769 words

HEADLINE: POLITICS MAY LEAVE DEMOCRATS STARVING

BYLINE: Bob McCarthy

BODY:

...announced his Republican bid for Hamburg supervisor, some local Dems are looking elsewhere for their weekly ziti fix.

The **preferred pasta** place to please political palates?

A few yards down Seneca Street at DiTondo's -- which, by the way, has never ...

17 of 25 DOCUMENTS

Palm Beach Post (Florida)

January 25, 1996, Thursday, FINAL EDITION

SECTION: FOOD, Pg. 4FN, KITCHEN COUNSELOR

LENGTH: 734 words

HEADLINE: CAREFULLY CONTROL HEAT OF PAN WHEN CARAMELIZING SUGAR

BYLINE: GHOLAM RAHMAN

BODY:

...green paste. Put the paste in a bowl and gradually drip in the oil. Mix well and set aside.

The **preferred pasta** with pesto is trenette, a long, flat dried pasta. Here is a technique you can use to make the sauce adhere better to the ...

23 of 25 DOCUMENTS

St. Louis Post-Dispatch (Missouri)

January 4, 1993, MONDAY, FIVE STAR Edition

SECTION: FOOD; Pg. 14

LENGTH: 419 words

HEADLINE: FOODIES REVIEW OF '92

BODY:

...puree Roasted or oven-dried tomatoes Romano beans Salsify Sauteed greens Smoked corn Wild mushroom ragouts **Preferred Pastas** Canneloni Lasagne (particularly vegetarian) Noodle pudding or cake Pappardelle Fashionable Fruits Banana Cherry Fig Grilled pineapple ...

Client ID/Project Name:
Research Information:
US Newspapers and Wires
"preferred pasta"

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1 of 25 DOCUMENTS

The Honolulu Advertiser (Honolulu, HI)

November 17, 2002 Sunday

SECTION: TAB; Pg. 12T

LENGTH: 1641 words

HEADLINE: HAWAI'I'S BEST RESTAURANTS

BYLINE: Adams Wanda;Gray Matthew, Staff

BODY:

...atmosphere.

Menu: The classic Italian American restaurant spread begins with a large pasta menu that allows you to match your **preferred pasta** to a variety of sauces, from pomodoro to bordelaise (there's a helpful illustrated guide to pasta styles on the menu). Other dishes ...

4 of 25 DOCUMENTS

New Times Los Angeles (California)

April 25, 2002 Thursday

SECTION: Dining/Columns

LENGTH: 1095 words

HEADLINE: The Buddha of Sawtelle
Japan Bistro Blue Marlin in West L.A.

BYLINE: By Stephen Lemons

BODY:

...spaghetti, and a delicious eggplant and wild mushroom concoction. There's also a sausage, bacon and vegetable spaghetti we're salivating to try, and a manila clam spaghetti we're longing to shove our snout into one day.

Our **preferred pasta** is the barbecued eel, sansai and wild mushroom spaghetti. The barbecued eel has a sweet taste similar to catfish, we think, and Ikemizu coaxes the flavor out of it by cooking the eel, mushrooms, sansai and De ...

5 of 25 DOCUMENTS

The Miami Herald

December 14, 2001 Friday FINAL EDITION

SECTION: WEEKEND; Pg. 36G

LENGTH: 911 words

HEADLINE: PAMPERED CHEF IS MIAMI LAKES' HIDDEN GEM

BYLINE: FABIOLA SANTIAGO, fsantiago@herald.com

BODY:

...aglio olio ($14.95), fresh shrimp sauteed in a very tasty white wine and garlic sauce. That, too, came with linguine, the **preferred pasta** here as it is light and cooked to just the right texture.

MEATY CHOICES

The carni section includes an impressive list of meats - from ...

7 of 25 DOCUMENTS

The Post-Standard (Syracuse, NY)

April 30, 2000 Sunday Final Edition

SECTION: CNY; Pg. AA2

LENGTH: 1008 words

HEADLINE: ADAPTING TO THE WAYS OF AMERICA LINDA YU DOESN'T FORSAKE THE CUISINE OF HER NATIVE TAIWAN

BYLINE: Jim Emmons Staff writer

BODY:

...childhood was different - more wedded to rice-based dishes of southern China. But Yu's parents came from northern China and **preferred pasta**-based dishes.

11 of 25 DOCUMENTS

Sun-Sentinel (Fort Lauderdale, FL)

August 1, 1999, Sunday, Broward Metro EDITION

SECTION: SUNSHINE MAGAZINE, Pg. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/136708

APPLICANT: Barilla Alimentare S.p.A.

JUN 18

CORRESPONDENT ADDRESS:
G. Franklin Rothwell
Rothwell, Figg, Ernst & Manbeck, P.C.
1425 K Street, NW
Suite 800
Washington DC 20005

RETURN ADDRESS:
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514
ecom112@uspto.gov

MARK: BARILLA - AMERICA'S PREFERRED PASTA

CORRESPONDENT'S REFERENCE/DOCKET NO: 2778-132

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

TO AVOID ABANDONMENT, WE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF OUR MAILING OR E-MAILING DATE.

RE: Serial Number 78/136708

This letter responds to the applicant's communication filed April 15, 2003.

STATUS OF THE APPLICATION

Registration was refused because of procedural informalities concerning the identification of goods and a disclaimer.

The applicant satisfactorily responded to the identification of goods requirement.

The examining attorney has considered the applicant's arguments carefully but has found them unpersuasive. For the reasons below, the refusal for registration based on the disclaimer requirement is continued and made **Final** for the below reason.

REFUSAL

The disclaimer requirement must be considered in the context of a descriptiveness refusal. A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. 1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry,* 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP section 1209.01(b).

The examining attorney must consider whether a mark is merely descriptive in relation to the identified goods, not in the abstract. *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985).

Essentially, the applicant argues that the wording in the mark is unitary as a slogan.

It is the examining attorney's position that the wording in the mark must be disclaimed irrespective of the House mark name BARILLA being attached to the other wording because the wording is such that it is informational or common phrases used in business. The following addresses Slogans, *TMEP §1209.03(s):*

> **1209.03(s) Slogans**
>
> Slogans that are considered to be merely informational in nature or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry are not registrable. *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (THE BEST BEER IN AMERICA so highly laudatory and descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness). *See* TMEP §1202.04 and cases cited therein.

The wording **AMERICA'S PREFERRED PASTA** in the applicant's mark is a combination of a primarily geographically descriptive term (AMERICA or AMERICA'S), a laudatorily descriptive term (PREFERRED), and a generic term (PASTA). Also, the wording as presented on the drawing is such that it is separate and set apart from the wording BARILLA, which further supports the disclaimer requirement.

In support of the refusal, the examining attorney submits evidence in the form of *selected* excerpts of stories taken from *LEXIS/NEXIS® computerized database,* listing the terms **and PREFERRED PASTA (the examining attorney also attaches selected excerpts of stories featuring the terms AMERICA'S FAVORITE PASTA).** *See* the attached enclosures.

The Trademark Trial and Appeal Board has held that materials obtained through computerized text searching are competent evidence to show the descriptive use of terms under Trademark Act Section 2(e)(1), 15 U.S.C. Section 1052(e)(1). *In re National Data Corp.*, 222 USPQ 515, 517 n.3 (TTAB 1984).

Also, the examining attorney previously provided third-party registrations showing the term **AMERICA'S with other descriptive matter** disclaimed. *See* the attached enclosure.[1] Third-party registrations are probative to the extent of demonstrating "that a mark or a portion thereof is suggestive or descriptive of certain goods and/or services and hence is entitled to a narrow scope of protection; properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used." *See* TMEP section 1207.01(c)(iv); *see also*, e.g., Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 917, 189 USPQ 693, 694-95 (C.C.P.A. 1975); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991); In re Dayco Products-Eaglemotive Inc., 9 USPQ2d 1910, 1911 (TTAB 1988); In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987); United Foods Inc. v. J.R. Simplot Co., 4 USPQ2d 1172, 1174 (TTAB 1987).

Therefore, based on the evidence provided the refusal made for the disclaimer requirement of **"AMERICA'S PREFERRED PASTA "** is deemed to have been proper.

Please note that the only appropriate responses to a final action are (1) compliance with the outstanding requirements, if feasible, (2) filing of an appeal to the Trademark Trial and Appeal Board, or (3) filing of a petition to the Director if permitted by 37 C.F.R. §2.63(b). 37 C.F.R. §2.64(a); TMEP §715.01. Regarding petitions to the Director, see 37 C.F.R. §2.146 and TMEP Chapter 1700. If the applicant fails to respond within six months of the mailing date of this refusal, this Office will declare the application abandoned. 37 C.F.R. §2.65(a).

Darryl M. Spruill
Trademark Attorney
Law Office 112
(703) 308-9112, Ext. 203
darryl.spruill@uspto.gov
/Darryl M. Spruill/

RESPONSE GUIDELINES

The applicant may respond via regular mail to the address listed above, or via e-mail to Ecom112@uspto.gov. In the body of the response, please clearly state the applicant's name, mark, serial number, Law Office and Examining Attorney, mailing date of the Office Action, and the applicant's telephone number.

To respond to this Office action electronically, the applicant must:

1. include the serial number in the subject line;

[1] No third party registration were provided for a disclaimer of the wording PASTA because the term is generic.

2. send the response to mailto:ecom112@uspto.gov. E-mail sent to any other address will NOT be processed, and may result in ABANDONMENT of the application;
3. submit specimens and/or evidence as scanned images or digital photographs in .GIF or .JPG format only. NO OTHER FORMATS WILL BE PROCESSED (TMEP §304.01);
4. respond within six-months from the Office action mailing date, or within the period stated in the Office action;
5. respond in English; and
6. sign the response electronically, e.g. /john smith/. *See* 37 CFR §1.4(d)(1)(iii); TMEP §804.05.

The examining attorney will send correspondence only to the e-mail address listed in the application. A request to change an e-mail address may be submitted by signed e-mail to one of the above e-mail addresses.

Note: only one e-mail address may be used for correspondence. TMEP §§304.03 and 304.07.

Send comments on the USPTO e-Commerce Law Office Pilot Program to Comments@uspto.gov.

PLEASE NOTE: Because it delays processing, submission of duplicate papers is discouraged. Unless specifically requested to do so by the Office, parties should not mail follow up copies of documents transmitted by fax. TMEP 702.04(e); Cf. ITC Entertainment Group Ltd. V. Nintendo of America Inc. 45 USPQ2d 2021 (TTAB 1998).

To respond formally via regular mail, your response should be sent to the mailing Return Address listed above and include the serial number, law office and examining attorney's name on the upper right corner of each page of your response.

To check the status of your application at any time, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at **http://tarr.uspto.gov/**

For general and other useful information about trademarks, you are encouraged to visit the Office's web site at **http://www.uspto.gov/main/trademarks.htm**

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY.

EVIDENCE

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2778-132
GRF:mec:nf

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of Barilla Alimentare S.p.a.	)	
Serial No. 78/136,708	)	Trademark Attorney Darryl M. Spruill
Filed: June 18, 2003	)	
	)	Law Office 112
Mark: BARILLA-AMERICA'S PREFERRED PASTA	)	

RESPONSE TO OFFICE ACTION

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

Dear Sir:

In response to the final refusal mailed June 18, 2003, Applicant responds in accordance with the headings therein.

DISCLAIMER

Please enter the following disclaimer:

-- No claim is made to the exclusive right to use "**AMERICA'S PREFERRED PASTA**" apart from the mark as shown.--

REMARKS

Since this appears to be the only outstanding matter at issue, it appears this application is in condition to be approved for publication.

Serial No.: 78/136,708
Mark: BARILLA - AMERICA'S PREFERRED PASTA
Attorney Docket No.: 2778-132

Respectfully submitted,

Barilla Alimentare S.p.A.

By: G. F. Rothwell

G. Franklin Rothwell
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